

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

IN RE: BROILER CHICKEN GROWER
ANTITRUST LITIGATION (NO. II)

TRANSCRIPT OF PROCEEDINGS

JULY 13, 2023

BEFORE THE HONORABLE ROBERT J. SHELBY

UNITED STATES DISTRICT JUDGE

MOTION HEARING - VOLUME I

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1 PROCEEDINGS

2 JULY 13, 2023:

3 THE COURT: Morning, everyone.

4 We'll go on the record and call Case Number
5 20-MD-2977. It's our In Re: Broiler Chicken Antitrust
6 Litigation case.

7 I see we have a few lawyers here with us today and
8 some guests. Why don't we take a moment and make our
9 appearances, please, for the plaintiffs.

10 Just one moment. Let me get unpacked here. As a
11 visiting judge, got everything in my bag.

12 For the plaintiffs.

13 MR. WALKER: Good morning, Your Honor. Dan Walker
14 from Berger Montague.

15 MR. SMITH: Good morning, Your Honor. Gary Smith
16 with Hausfeld.

17 MR. MADDEN: Good morning, Your Honor. Patrick
18 Madden with Berger Montague.

19 MS. COOLIDGE: Good morning. Melinda Coolidge
20 from Hausfeld.

21 MS. DERKSEN: Good morning. Samantha Derksen with
22 Hausfeld.

23 MR. BUTLER: Dudley Butler from Butler Farm &
24 Ranch Law Group.

25 THE COURT: Butler is the last name?

1 MR. BUTLER: Butler. For the plaintiff.

2 THE COURT: All right. Thank you.

3 All right. And for Pilgrim's.

4 MR. OTTAWAY: Larry Ottaway for the defendant.

5 MR. KASOWITZ: Marc Kasowitz from Kasowitz,
6 Benson, Torres, Your Honor, for Defendant Pilgrim's.

7 MR. TORRES: Morning, Your Honor. Hector Torres
8 from Kasowitz, Benson, & Torres on behalf of Pilgrim's.

9 MR. BROWNSTEIN: Good morning, Your Honor. Henry
10 Brownstein from Kasowitz, Benson, Torres, on behalf of
11 Pilgrim's.

12 MR. CYRULNIK: Good morning, Your Honor. Kevin
13 Cyrulnik, Kasowitz, Benson, Torres, on behalf of Defendant
14 Pilgrim's.

15 MR. ROSS: Good morning, Your Honor. David Ross
16 from Kasowitz, Benson, Torres, for Defendant Pilgrim's.

17 THE COURT: Oh, go ahead.

18 MR. PECORINI: Good morning, Your Honor.

19 Michael Pecorini from Kasowitz also on behalf of Pilgrim's.

20 THE COURT: All right. Thank you.

21 I don't think we have anyone who's planning to
22 make any appearances for any of the other parties in the
23 case. Am I wrong about that?

24 All right. And we have a number -- hi.

25 MR. DOVERSPIKE: Your Honor, Adam Doverspike for

1 Defendant Sanderson Farms. I don't intend to participate,
2 but wanted to let you know I was here, Your Honor.

3 THE COURT: It's good to see you. Thank you.

4 Anyone else who cares to make an appearance?

5 All right. A couple of housekeeping matters as
6 we're beginning. Of course, we have two matters set on the
7 calendar for today and tomorrow. We'll take up tomorrow the
8 plaintiffs' motion seeking class certification or ECF Number
9 454 in the main case. I didn't separately call our
10 individual cases, but, of course, this is a joint hearing in
11 the main MDL and the sub-matters. And I think today will be
12 largely focused on Pilgrim's motion to exclude the
13 plaintiffs' expert, Hal Singer, under Rule 702. It's our
14 ECF Number 456.

15 The plaintiffs, of course, have their own *Daubert*
16 motion pending, and I understand from your submissions that
17 the plaintiffs don't believe that it's necessary for us to
18 resolve that issue to reach the class certification issues.
19 We appreciate the briefing that you-all submitted, I think
20 drawing into sharp focus the interrelationship between
21 Dr. Singer's opinions and the plaintiffs' class
22 certification motion.

23 I can tell you that in advance of our hearing, as
24 is always the case, we have spent a lot of time with your
25 papers. We've read all of them, most of them more than

1 once. They're dense. You've given us a lot to think about.
2 I've never been more grateful for that economics PhD I got
3 from Stanford. I kid. So I'm really eager to hear from all
4 of you today. I think you'll see a sponge on the bench.
5 I'm interested in trying to soak up as much of your
6 knowledge and expertise as I can, especially today.

7 We've received just about -- just briefly, to get
8 this out of the way before we begin. I think we've now
9 received four letters from individuals in Oklahoma claiming
10 some interest in these proceedings and asking for guidance
11 from the Court about how to present claims. We've lodged
12 those on the docket. They're Docket Numbers 518 to 521.

13 I think the best thing to do is to ask the
14 plaintiffs to have the claims administrator send a claims
15 form for at least the one -- I think most of the deadlines
16 have passed.

17 But, Mr. Smith, do you have a suggestion?

18 MR. SMITH: We've already done so, Your Honor, for
19 the Sanderson settlement. So for the one claims period that
20 is still open, those growers are being sent claim forms
21 right now.

22 THE COURT: Terrific. Oh, we may have received
23 one more. We'll just keep putting them -- placing them on
24 the docket, and we'll just understand that the plaintiffs
25 will be notifying the claims administrator. Great. Thank

1 you. Even untimely claims, I suppose, we should at least
2 process, then we can take them up in turn if there are any
3 untimely claims.

4 MR. SMITH: For Koch, we can do that. For Tyson
5 and Perdue, because of the distribution already, we won't be
6 able to, Your Honor.

7 THE COURT: Fair. All right. Thank you.

8 with respect to the *Daubert* motion and Dr. Singer,
9 and I think even our class issues tomorrow, most of your --
10 maybe all of your papers, I think, are sealed under file
11 entirely, not just partially, and I think I understand why.

12 I think most of the discovery in this case, both
13 party discovery and third-party discovery, was undoubtedly
14 provided under protective orders. This is a presumptively
15 open proceeding. I mean, we're litigating in federal court
16 now, just as we will be at trial. I've read those papers.
17 I don't see any trade secret information. There may be some
18 competitively sensitive information perhaps, and I'm
19 especially mindful about potentially sensitive information
20 that third parties might have produced, but this is an open
21 hearing, and I don't have in mind closing the court. I
22 don't have in mind sealing the transcript. And if there's
23 something that you're about to discuss and you think it
24 needs to be in a sealed portion of the transcript, you
25 should let me know, and we can work through that if and/or

1 when we get there.

2 I think that's probably all you need to hear from
3 me, and now I'm eager to hear from you, unless there's
4 anything more we should take up by way of housekeeping.

5 Mr. Walker and Mr. Smith?

6 MR. SMITH: No, Your Honor.

7 MR. WALKER: No, Your Honor.

8 THE COURT: For the defendants? And tell me, to
9 whom should I generally be directing questions at this
10 table?

11 MR. KASOWITZ: Your Honor, you can direct them to
12 me and -- but, for today, it will be Mr. Torres that you'll
13 be directing, I think, your questions and attention to. It
14 will be me tomorrow.

15 THE COURT: All right. Thank you.

16 MR. KASOWITZ: Thanks, Your Honor.

17 THE COURT: Mr. Torres, let me invite you to take
18 the podium.

19 I'm notorious for taking control of these
20 proceedings and dragging the lawyers around everywhere, and
21 I think the most helpful thing today will be for me to
22 listen to you. So I won't be bashful about questions and
23 eager to hear what you have to share.

24 MR. TORRES: Good morning, Your Honor. Hector
25 Torres for Pilgrim's Pride.

1 Your Honor, on this Rule 702 motion, we're seeking
2 to exclude the opinions of the plaintiffs' expert, Hal
3 Singer, on the grounds that they are based on unreliable
4 methodologies and in certain material respects, also are not
5 relevant to the issues in this case.

6 And one of the things, we're seeking an order
7 excluding Dr. Singer from providing any opinions concerning
8 the plaintiffs' claim and core theory in this case. And to
9 be clear, Your Honor, plaintiffs' claim and core theory is
10 that five defendant integrator companies and 16 alleged
11 co-conspirators engaged in a nationwide, 11-year agreement,
12 the purpose and effect of which was to suppress the pay of
13 more than 24,000 growers.

14 Plaintiffs also claim that this overarching
15 agreement consisted of two separate mutually reinforcing
16 agreements, a nationwide no-poach agreement and a nationwide
17 information sharing agreement.

18 And I plan to first briefly address the governing
19 standard on the motion and then to address Dr. Singer's
20 opinion concerning the overarching agreement. I will then
21 turn to his regressions. And before discussing the
22 regressions, I plan to provide an overview of some basic
23 economic and other facts concerning the market for grower
24 services, particularly as they relate to Dr. Singer's
25 opinions, based on the evidence in this case.

1 Briefly, on the standard, Your Honor. As Your
2 Honor knows, the Courts have essentially distilled the 702
3 *Daubert* standard to two overarching requirements, the
4 expert's opinion must be both reliable and relevant. The
5 Court has broad latitude in determining not only whether the
6 expert's testimony is reliable, but also in deciding how to
7 determine its reliability.

8 And particularly relevant to this case,
9 Your Honor, an expert's regression in antitrust in other
10 cases are not immune from *Daubert* scrutiny. Any expert
11 testimony that relies on regressions that are either
12 unreliable or not relevant to the issues in the case should
13 be excluded.

14 And courts have not hesitated to exclude
15 unreliable expert opinions at the class certification stage.
16 As I will discuss, courts have excluded Dr. Singer's
17 opinions in other antitrust class action cases, including at
18 the class certification stage. His opinions have been
19 excluded as unreliable because they were based on flawed
20 regressions.

21 Indeed, Your Honor, as we will demonstrate, many
22 of the fatal flaws that were found by the courts in those
23 cases also infect Dr. Singer's regressions in this case.

24 Now, let me turn to the overarching agreement
25 component of our claim.

1 THE COURT: Before you leave the standard, the
2 parties all briefed this question under the current Rule
3 702. That rule has been amended, effective December 1st.
4 There's a different standard that courts will be applying.
5 You briefed it under the current rule, I plan to decide it
6 under the current rule, but I wanted to ask if anybody
7 wanted to be heard about that.

8 I'll ask the plaintiffs later.

9 You presume the current rule should govern?

10 MR. TORRES: Correct, Your Honor.

11 THE COURT: All right.

12 MR. TORRES: Okay. Now, Your Honor, on the
13 overarching agreement, the first opinion we'd like to
14 discuss relates to his opinion concerning the overarching
15 conspiracy alleged by the plaintiffs. And just to be clear
16 here, we seek an order excluding any testimony from
17 Dr. Singer concerning the overarching agreement as they have
18 defined it. And we seek this exclusion for a very simple
19 reason. Dr. Singer has not provided any reliable basis for
20 offering any such opinion, and his theory -- his theory as
21 to how the two separate agreements are mutually reinforcing
22 is not relevant to this case.

23 THE COURT: How can that be? At the class
24 certification stage, among other rules that I'm required to
25 apply, I presume the truth of the well-pled factual

1 allegations in the complaint. Of course, we go beyond the
2 complaint, but this is the plaintiffs' theory of the case.
3 The expert -- the jury will decide whether there's a
4 conspiracy. If there is, who was a member, what the
5 duration was, and what the scope was. But Dr. Singer can't
6 ignore the plaintiffs' theory when he's providing testimony
7 about his other opinions in the case.

8 Now, he -- he's not a Magic 8 Ball. He's not
9 looking into people's brains, and he's not going to
10 articulate views about the intent of the actors, but isn't
11 it relevant under the plaintiffs' theory?

12 MR. TORRES: Well, Your Honor, the problem is that
13 the theory that they have articulated is an overarching
14 conspiracy with two separate components. We're fine so far.
15 But it also has a mutually reinforcing element to it, and
16 that's the core issue. And if you recall at the motion to
17 dismiss stage, there was an issue in terms of which --
18 whether the -- they were whether the claims would be treated
19 separately or whether they would be treated as an
20 overarching. And obviously that's significant because if
21 they're treated separately, there's a different standard
22 that governs with respect to the application of the rule.

23 Under the no-poaching agreement, it's a per se
24 standard, and under the information sharing, it's the rule
25 of reason. And the reason this issue is important, Your

1 Honor, is because, in this case. He definitely has done
2 extensive work with respect to the no-poach regression, the
3 no-poach opinion. He's run his regressions and they all
4 relate -- you know, those regressions relate to the no-poach
5 opinion, and then he has a separate part of his report and
6 separate sections of his report which relate to the
7 information sharing. That's fine. He can testify about
8 that.

9 But what he can't testify about is the notion that
10 he has reliable evidence to support the overarching
11 conspiracy theory because one element of that theory is that
12 it be mutually reinforcing. And he's done no evidence.
13 He's done no tests, no analyses, no economic studies to
14 capture what that means. And we still are unclear. I mean,
15 he has an obligation to testify as to the work that he has
16 done, but if he goes beyond it, then we have to look at,
17 well, what's the basis for his opinion to go beyond it. And
18 the basis is very limited. He doesn't express it.

19 THE COURT: I just don't understand it to be that
20 complicated. I mean, other parts of his analysis are for
21 sure, but as a matter of basic economic theory, to say it
22 doesn't make sense among competitors for you to share
23 contemporaneous information about your growers, unless
24 you've agreed you're not going to take each other's growers.
25 Now, that may be right and it may be wrong and there may be

1 other components to it, but this isn't -- this isn't
2 susceptible to a formulaic expression, it's just an economic
3 theory and principle, isn't it? And he's articulated it,
4 not in great detail in report, perhaps, but that's what he's
5 -- that's all he's said about this so far; right?

6 MR. TORRES: He basically has said very little.
7 On the overarching component of it, there's maybe one or two
8 sentences in the report that deal with it. I mean, that's
9 it. That's the sum total. So on a Rule 702, the Court has
10 to make an assessment. Has he -- has he proposed -- this is
11 for purpose of the jury, to assist a jury in making this
12 determination. What methodology or principles has he
13 brought to the table that will enable the jury to decide
14 that issue? None.

15 THE COURT: Won't it matter in this instance? It
16 seems to me that your first subject and seventh, relating to
17 Dr. Singer's opinions, strike me as the kind of issues that
18 we have to resolve at trial when we hear what he's asked and
19 what he says. And you may object it goes beyond the scope
20 of what he said in his report, you may object -- who knows
21 what your objections might be. But don't we need to hear
22 what that opinion is before we can assess whether it's
23 reliable and relevant?

24 MR. TORRES: Well, Your Honor, the problem is that
25 you have to get past -- the Court has the gatekeeper role to

1 keep out opinions that could be misleading or that are not
2 supported by reliable evidence. I mean, that are reliable
3 based on expert standards, based on principles.

4 The standards are you have to rely on -- you know,
5 on the facts and the data in the case, you have to rely on
6 principles that are -- that are reliable, and they have to
7 be reliably applied. You take all those criteria there, and
8 with respect to the overarching conspiracy theory, there's
9 one sentence.

10 And so we're not -- we're not saying that he
11 should be precluded from testifying about the no-poach
12 agreement, about his regressions. He can testify all he
13 wants about that. We're not saying he can't testify to the
14 information sharing, all you want. But in connection with
15 the overarching theory, this overarching claim, with this
16 mutually reinforcing, that is a problem. And the reason
17 it's a problem is because, ultimately, it comes down to an
18 issue concerning the standard that governs the case.

19 And if he is able to bring in through the back
20 door information concerning, you know, the information
21 sharing, in order to avoid and not have to deal with the
22 requirements that otherwise would apply at the rule of
23 reason stage, then he's able to circumvent those
24 requirements, which include greater specificity with respect
25 to having to set forth the basis of a rule of reason claim.

1 THE COURT: I think the reason -- the reason I'm
2 getting high-centered is I don't know what this opinion is
3 that you're objecting to, that Dr. Singer is going to offer
4 at trial.

5 You've just now talked about -- as I've understood
6 what you just said, you're concerned that an expert might be
7 now talking about standards that apply or the law that the
8 jury is supposed to consider or the elements of the
9 evaluation, which is all stuff that I'll be charging the
10 jury on. The experts won't be talking about this at trial.

11 But I don't -- I truly don't -- I am high-centered
12 on this question that we have these two theories, the
13 information sharing and the no-poach, and that the objection
14 is an economist says those are two things you wouldn't
15 expect to see in isolation, I'm not surprised to see them
16 together.

17 The jury is going to have to decide whether either
18 or both exist and whether there is an overarching
19 conspiracy. No expert is going to say there is an
20 overarching conspiracy. The jury will have to decide it.

21 So what is the opinion exactly that you're trying
22 to strike?

23 MR. TORRES: Well, the opinion is -- the opinion
24 we're trying to strike is essentially the opinion that --
25 the sole support that he provides for this part of his

1 testimony, for this notion that is mutually reinforcing.

2 And just to be precise, Your Honor, this appears
3 -- and this is -- this is his sole basis in the hundreds of
4 pages of reports that he submitted, this is his basis for
5 opining on this mutually reinforcing component of his
6 theory. This is it. And I quote: "It is not rational in
7 the absence of a no-poach agreement for an integrator to
8 share with another integrator information about which
9 growers are performing the best because such information
10 would allow the second integrator to identify targets for
11 poaching, making poaching more effective and profitable."
12 That's it. That's the sum total of the decision.

13 And in connection with this, the plaintiffs have
14 taken the position in this case that any information with
15 respect to efficiencies are not part of the equation.
16 Any -- any -- in other words, when we look at the impact of
17 the conduct -- there are two things you have to evaluate
18 when you're dealing with the rule of reason. One of the
19 things you have to evaluate is whether there are
20 procompetitive effects as a result of the information
21 sharing. Perfectly fine.

22 In this case, we never pursued and didn't have --
23 didn't have any obligation to pursue that particular line of
24 discovery, that particular line of analysis, because we're
25 operating under the per se standard. And under the per se

1 standard, there's no obligation to -- on behalf of the
2 defendant, there's no obligation to assemble and put
3 together and present a case concerning the procompetitive
4 effects.

5 So here, he's actually making -- he's avoiding the
6 issue and he's able to -- trying to, through the back door,
7 bring in this -- this argument without -- and really
8 depriving Pilgrim's of the opportunity to present the
9 evidence that we otherwise would have had if we were
10 operating under the rule of reason.

11 So that's the reason it's important, Your Honor.
12 In terms of -- it's important. And I understand what you're
13 saying in terms of a jury, and you can just pretend they can
14 decide, but it's really a more fundamental and a core issue
15 that really goes to the requirement, particularly under
16 *Comcast*, that there be a nexus between the damages and the
17 damage models that have been presented by the expert and the
18 theory that the plaintiff has presented.

19 And here, what we're arguing, is that based on the
20 report that he submitted, there's a complete disconnect
21 between the report, those opinions, and the analyses that
22 he's done in his report.

23 THE COURT: Why?

24 MR. TORRES: Because there's -- there is --
25 there's no -- this opinion that he expressed here, which I

1 read to you, Your Honor, concerning the absence that you
2 identify, he's basically saying that you can assume that the
3 reason they're sharing information -- and this is the
4 implication of this -- because there was a no-poach --
5 because there was a no-poach agreement. Well, that is --
6 what's his basis for that? I mean, other than -- is he --
7 if you look at the actual data in connection with -- that
8 he's referencing here, for sharing the data -- there's two
9 types of data. There's the grower pay data and then there's
10 a performance metrics data, things like feed conversion, the
11 livability; okay? So those are two separate components.

12 The plaintiffs' theory from the outset has been
13 that the only thing that they're focusing on here is the
14 exchange of data concerning pay. And they've taken the
15 position, very clearly, that anything unrelated to pay,
16 related to efficiencies, is not in the case. So he's
17 basically confusing that. He's bringing it into the case,
18 and he's using it affirmatively, depriving Pilgrim's of the
19 opportunity to develop the record to oppose it.

20 THE COURT: So I've heard you say different things
21 now. That sounds like a 403 argument, not a 702 argument.
22 And with respect to 702, I don't understand what -- he's not
23 going to do a regression on a basic economic theory that --
24 what -- what the plaintiffs have proposed and alleged here
25 makes sense economically. You wouldn't expect to see one

1 without the other, if that's his opinion. You read it.

2 or maybe you're arguing that we're really
3 disputing whether it's performance or pay, and maybe he's
4 using a different word than the plaintiffs used in their
5 complaint. But -- so which is it? or is it all of those
6 things?

7 And I still don't -- what analysis do you think an
8 economist is supposed to do to prove a general theory about
9 why it would make sense that these agreements would be
10 mutually reinforcing at a high level --

11 MR. TORRES: Well, Your Honor, but that's the
12 point. If there is no analysis, then we don't need -- then
13 we don't need -- then we don't need this expert. I mean,
14 his role is to come in and bring some expertise. Then this
15 is ipse dixit; okay? So he thinks that's the case, but
16 there's no economic analysis. He has to have some reasoned,
17 principle basis that our experts are able to explore and to
18 analyze. And in the context of doing that, that's when we'd
19 have an opportunity to develop the record with respect to
20 the difference on -- on the procompetitive effects of
21 information sharing.

22 THE COURT: -- do your experts have views about
23 whether or not these agreements like this would be mutually
24 reinforcing in economic theory?

25 MR. TORRES: Well, Your Honor, I'm sure they do,

1 but that's not -- but they're not in the case. I mean, if
2 -- I'm sure they do, and if they were in the case, if that
3 was really a core element of this case, then there will be
4 another expert report, a separate expert report, probably
5 200 pages long, dealing with the procompetitive effects.
6 But we don't have that because we're operating under the
7 rubric of this overarching conspiracy that kind of lets
8 them, you know, avoid all those issues, make these kind of
9 statements just based on his ipse dixit. That's all it is.

10 of course, he can express the opinion, but the
11 question is, is there a reliable foundation for an expert to
12 infect a jury with that kind of information, where that's
13 one of the core issues in the case, whether there's an
14 overarching agreement.

15 THE COURT: It's -- I'm really trying to
16 understand. It strikes me as just an entirely different
17 subject matter, for example, than a model to calculate
18 damages or to decide whether everyone's been -- all the
19 members of the class have been harmed, a regression
20 analysis. This sounds like economic -- basic economic
21 principles and theories that would be helpful to a sixth
22 grade teacher who's on our jury, who may not have facility
23 with economic theory. So it seems relevant and helpful.

24 I don't see what analysis is missing. If there's
25 an issue here about the relationship between the per se

1 standard and the rule of reason -- this is something I was
2 hoping we would be discussing today. I wonder if we're a
3 little bit ahead of ourselves, but maybe we're not. I can
4 see that it's relevant, but it hasn't been clearly discussed
5 in the papers. You both take different positions.

6 Your statement today, Mr. Torres, that the rule of
7 reason -- that the *per se* standard applies to the no-poach
8 is the first time I've heard the defendant say that. I
9 think you said otherwise in your papers. I think you
10 dispute that. I think you argue that the rule of reason
11 applies.

12 And the reason I've been thinking that this may be
13 relevant is because I think it will come into our discussion
14 about Dr. Singer's discussion about the relevant market.
15 But one step at a time, I suppose.

16 I'll go back to my first part. Isn't it basic
17 economic theory?

18 Wouldn't it be helpful to a jury?

19 And isn't Dr. Singer in a position to have an
20 opinion about that?

21 And hasn't he basically told you what it is?

22 MR. TORRES: But, Your Honor, I mean, the issue is
23 that this -- they were setting up what the nexus is going to
24 be with the -- between the opinion and the analyses that
25 he's done. And *Comcast* is a good example of this, where the

1 expert -- the expert essentially had four theories of the
2 case and prepared a damages analysis and a report. And then
3 the case went forward, and it turned out that the judge
4 threw out three of the theories. So now the expert is left
5 with -- you know, with this report based on the three
6 theories.

7 So right now, we're setting -- we're in precisely
8 that situation because if it -- the model now has been
9 structured and the damages have been structured in a way
10 that essentially combines -- you know, it has a separate
11 damage number for the no-poach, and then it has a separate
12 damage number for the information sharing, but the
13 information sharing, so-called, is really two constituent
14 elements. There's actually an information sharing and a
15 no-poach. So it has both.

16 So if -- if the case goes forward and there's --
17 an analysis is done with respect to the issue of the
18 no-poach, and they don't prevail on that part of the case,
19 that means that the per se standard is out, and you have the
20 information sharing, which is under the rule of reason.

21 And then the rule of reason, obviously -- because
22 right now, we've, you know, been operating under the per se
23 standard that applies to both of them. So that's the issue.

24 THE COURT: So then are we procedurally out of
25 step?

1 I think Pilgrim's is going to invite me to decide
2 that issue in the next round of briefing for summary
3 judgment. But I'm not -- I haven't decided that issue
4 today.

5 And we don't have the *Comcast* problem today
6 because both of those claims, both of those theories, are
7 still alive in the case today.

8 MR. TORRES: Well, we're making the record, Your
9 Honor, that we see this -- this nexus, and we're making the
10 record now that if something happens in the future in
11 connection with a disaggregation of the claim that has
12 implications under standard review, that -- that they
13 weren't expecting it, we're making the record now and
14 putting them on notice.

15 THE COURT: That, I understand. Okay.

16 MR. TORRES: Thank you, Your Honor.

17 Now, Your Honor, before turning to Dr. Singer's
18 regressions and setting the context for the analysis of
19 those regressions, a useful starting place is some of the
20 basic economics and the facts concerning the market for
21 grower services.

22 These are facts there are either undisputed or
23 indisputable. Plaintiffs purport to represent, as I
24 mentioned before, a putative class of more than 24,000
25 individual farmers, who, at some point between 2008 and

1 2019, raised chicks for one -- of 21 different integrator
2 companies that collectively own 147 processing plants
3 disbursed throughout the country.

4 The market for grower services is local. 93
5 percent of all growers -- that's more than 22,000 of the
6 24,000 potential class members at issue here -- are located
7 within 50 miles of the plant. This geographic limitation is
8 driven by the need to reduce transportation costs and
9 protect the health of the birds. The greater the distance
10 the birds have to travel obviously, the greater the risk of
11 mortality.

12 Local factors materially impact grower pay because
13 growers are hired from within a limited geographic range.
14 Decisions about grower pay, necessarily, are impacted by
15 local and regional factors. Among the local competitive
16 factors impacting grower pay is, number one, the number of
17 integrator companies throughout the many different regions
18 of the country. Local plant managers, with some limited
19 exceptions, make decisions about grower pay.

20 And as I mentioned before, this case involves 147
21 separate plants, which means that you have at least 147
22 separate local managers at those plants, at least, because
23 some of them have multiple local managers. And different
24 companies have different approaches to pay.

25 Also at the local level, grower pay varies

1 depending on the specific grower, the type of broiler house,
2 such as, among others, conventional housing,
3 tunnel-ventilated houses, and premium houses; the size of
4 the birds that are delivered by the local plant, the number
5 of chicks that are delivered to the grower's farm, and a
6 host of other factors.

7 Now, the importance of the local factors on grower
8 pay was explained by the director of live operations at
9 Mountaire, David Patey, at his deposition. And I'll just
10 give you a little question and answer in terms of what his
11 testimony was.

12 "QUESTION: Now, are the payment terms in all
13 these contracts with the growers in North Carolina
14 the same as the payment terms for its growers in
15 the Delmarva Peninsula?

16 "ANSWER: No.

17 "QUESTION: Why is that? Why are they different?

18 "ANSWER: Well, different reasons geographically.
19 Costs were different for many items. The overall
20 costs of living I think was higher on Delmarva
21 than it was in North Carolina. I don't think the
22 labor rate was as high in North Carolina, but
23 specifically to the chicken business, for
24 instance, where North Carolina was located,
25 there's a lot of lumber industry."

1 That's his testimony at pages 197 and 198. And he
2 also testified that fuel costs were different in different
3 locations.

4 Now, that's important, Your Honor, because that
5 wide pay variance, based on integrator-specific,
6 plant-specific grower-specific, house-specific, and a host
7 of other factors is not genuinely in dispute in the case.
8 And -- in fact, it's conceded at page -- on page 6 of
9 plaintiffs' option brief.

10 Now, all of that pay variance at both the company,
11 the plant, and the grower level is clearly shown in graphs
12 of the actual grower pay data over an 11-year period.

13 Exhibit 31, from McCrary's report, shows the
14 grower pay from all 147 plants from 2008 to 2019.

15 Do we have that?

16 Okay. As you can see from this graph, Your Honor,
17 the grower pay -- and these lines represent the different
18 integrators across that time span. As you can see,
19 tremendous variance in all directions, which is just
20 reflective of the reality and the nature of the market.

21 Now, with that, let me now turn to more
22 specifically address a number of Dr. Singer's regressions.

23 THE COURT: Before we get to the regressions, is
24 it not the case that it can both be true that grower
25 compensation is driven by local and regional factors,

1 including those you've described and others, I think, that
2 Dr. Singer takes into account, including the tax structure,
3 local tax structures, and other things. Can't it also be
4 true that nationwide grower compensation can be suppressed
5 because of an overarching conspiracy among the integrators?

6 Those things are not mutually exclusive, are they?

7 MR. TORRES: Well, no. You know, theoretically,
8 Your Honor -- and we're not disputing that you can't have an
9 overarching conspiracy where all the -- all the companies go
10 into a room and agree, let's -- okay. Let's agree that
11 we're going to uniformly reduce pay by 5 percent. Of
12 course, that can happen, and it has happened in certain
13 cases. It actually has happened and cases have been
14 litigated based on that, but that's not this case.

15 So yes -- the answer is yes. It's theoretically
16 possible. Well, then it gets to the issue of, you know,
17 what the evidence is in this case. And, more importantly,
18 Your Honor, what is the nexus between the regressions that
19 he's done, because in order to understand the reliability of
20 those regressions, it is also important to understand the
21 local competitive dynamics that is informing the data that's
22 being inputted into the regression models.

23 THE COURT: Fair enough. And we're going to get
24 into -- I think this is what we're going to spend most of
25 today probably talking about. But didn't you just reframe

1 the plaintiffs' theory in the case?

2 The plaintiffs have not alleged -- this isn't one
3 of those cases where the CEOs of five companies got together
4 and agreed they wanted to reduce their cost by 10 percent or
5 5 percent. They're not -- the plaintiffs' evidence, I don't
6 think, and the theory isn't that the integrators targeted a
7 specific decrease. It was that they wanted to control their
8 costs, and they wanted -- through reducing grower
9 compensation generally, and that these were the vehicles for
10 which they wanted to accomplish that feat, and that -- and
11 that they did, nationwide. That's the plaintiffs' theory.

12 That theory is not in conflict with the defendants'
13 position that grower pay is a product of localized factors as
14 well.

15 MR. TORRES: Right. Well, Your Honor, I was
16 responding to your question, where you asked me whether
17 theoretically that was possible, and I gave you the
18 affirmative response.

19 THE COURT: Okay.

20 MR. TORRES: In connection with the next step,
21 which is really what the evidence is in this case -- and
22 you're right. I mean, their theory is this kind of generic,
23 overarching agreement theory -- and that's why this kind of
24 tails back to the point about Dr. Singer because it's the
25 theory -- I mean, something has to hold that theory

1 together; right? So, yes, theoretically, it's possible that
2 there could be tacit collusion. Every one just, you know,
3 somehow signals to one another that we're going to uniformly
4 suppress pay by a particular percentage. Zero evidence of
5 that here, but that -- that is really the divide where we're
6 at. And that's why Dr. Singer's regressions -- which really
7 go to the heart of that issue -- in terms of the competitive
8 dynamic in this market, it's important to understand the way
9 he's run them and the fundamental flaws that -- as I
10 mentioned before, flaws that have been identified by other
11 cases in locking out his opinions.

12 Now, let me just turn to Dr. Singer's no-poach,
13 you know, regression, Your Honor. He claims that -- and
14 this is the one based on his -- the natural experiment. He
15 claims that there was a two-and-a-half year breakdown of the
16 nationwide no-poach agreement between March 1st, 2013, and
17 July 31, 2015, in the Delmarva region. This is what he
18 calls the "war on the shore."

19 Now, Dr. Singer describes Delmarva as providing a
20 natural -- a "natural experiment." A natural experiment
21 that allows him to estimate the degree to which grower pay
22 was suppressed because of the alleged no-poach agreement.

23 Now, the Delmarva region includes certain parts of
24 only three states -- and this is a peninsula -- Delaware,
25 Maryland, and Virginia. And this region includes only five

1 out of the 21 integrators, Allen Harim, Amick, Mountaire,
2 Perdue, and Tyson, and only ten out of 147 plants at issue
3 in this case. Pilgrim's is not one of the integrators in
4 Delmarva.

5 Now, the evidence of the alleged no-poach
6 agreement in effect in Delmarva before 2013 -- this is the
7 before period -- consists of email exchanges between the
8 employees of the five integrators. That's their evidence
9 that there was an agreement. Now -- and this evidence
10 relates to decisions concerning the ten plants in Delmarva.

11 Now, what Singer does, his regression compares the
12 pay per pound and pay per square foot of the Delmarva
13 growers in the period before and after the alleged breakdown
14 of the no-poach agreement, the "war on the shore." And he
15 estimates that plants in the Delmarva region paid their
16 growers approximately 4 percent more per pound than they did
17 before March 1st, 2013.

18 And Dr. Singer's opinion is that this increase in
19 grower pay in the Delmarva region essentially was caused by
20 the breakdown of the alleged no-poach agreement. That's the
21 basis for the opinion that the alleged 4 percent suppression
22 in Delmarva "flowed exclusively from the NPA." That's at
23 *Daubert* opposition 8 and Singer's report, paragraph 9.

24 Now, let me turn to the issue of the problems and
25 the flaws, the fundamental flaws with his work. His

1 no-poach regression suffers from a fundamental
2 methodological flaw that renders it unreliable.

3 First, Dr. Singer never compares the increase in
4 actual grower pay in Delmarva to actual grower pay in the
5 rest of the country where he alleges the no-poach agreement
6 did not break down, but, under his theory, continued to be
7 maintained. Had he done that analysis, he would have seen
8 that grower pay and the rate of grower pay outside of
9 Delmarva increased as much or more on average than the
10 grower pay and the rate of pay in Delmarva during the same
11 period.

12 The grower pay in Delmarva increased on average
13 12.4 percent, but increased 14.7 percent at the plant for
14 some -- for the same integrators outside of Delmarva, where,
15 again, Dr. Singer claims that the no-poach agreement did not
16 break down.

17 In other words, the actual pay data refute
18 Dr. Singer's opinion that a breakdown in the no-poach
19 agreement in Delmarva caused the pay increase during the
20 "war on the shore," and he does not show that the alleged
21 agreement, the no-poach agreement, caused the grower pay to
22 be suppressed in Delmarva before the "war on the shore."

23 Now, this is demonstrated -- and this fundamental
24 flaw is really vividly demonstrated by Dr. McCrary's work,
25 his difference-in-difference model, which is a

1 widely-accepted methodology in antitrust cases. And a
2 difference-in-difference model basically and as applied
3 here, it compares two things. It compares to changes in
4 grower pay at Delmarva plants before and after the "war on
5 the shore." So that's one point for the comparison. It
6 compares that to changes in grower pay in the non-Delmarva
7 plants during the same period. And by the non-Delmarva
8 plants, of course, we're talking about 90 percent -- the
9 other 90 percent of the growers.

10 Now, if a breakdown in the no-poach agreement had
11 an effect on grower pay, then the grower pay in Delmarva
12 would have increased at a greater rate than the grower pay
13 in the rest of the country, but the results show precisely
14 the opposite.

15 In other words, contrary to Dr. Singer's opinion,
16 there was nothing exceptional about the rate of pay growth
17 in Delmarva during the "war on the shore" when compared to
18 the pay growth rates of the other integrators. And under
19 Dr. Singer's theory that the no-poach agreement was
20 suppressing pay, the Delmarva pay should have increased more
21 than the non-Delmarva pay, but that is not supported by the
22 actual grower pay data.

23 THE COURT: So with respect to this criticism,
24 isn't this really just an argument that -- not that
25 Dr. Singer's calculations were incorrect, not that he

1 misapplied his model. It's that there are additional
2 comparisons that he should have made. Your expert says you
3 should also compare -- if you're trying to test this,
4 compare this data point with this data point. Compare that
5 data point with that data point.

6 This sort of disagreement arises between experts
7 all the time. This is a classic -- let me rephrase. Why is
8 that not a classic battle of the experts? What are the
9 right data points to compare?

10 MR. TORRES: Right. Well, Your Honor, I think
11 it's -- it's really this opinion in conjunction with the
12 others that I'm going to be expressing, because I think that
13 is the combination of them that really rises to the
14 threshold of just rendering them unreliable and really
15 taking it outside the realm of the battle of experts.

16 THE COURT: That's how -- that's how I think I've
17 understood generally. That's not what you've said in your
18 papers, but that's my takeaway from it; right? It's the
19 collective flaws that you see in this analysis that in your
20 judgment --

21 Is my microphone not on for you? Am I not
22 speaking loudly enough?

23 THE REPORTER: No, it's fine.

24 THE COURT: It's not a commanding voice?

25 MR. TORRES: We could hear you.

1 THE COURT: I'm all ears. Go ahead.

2 MR. TORRES: Okay. Thank you.

3 In any event, just to sum it up, I mean, the
4 results of this particular aspect of the work with the
5 difference in difference contradict his opinion.

6 Now, if this aspect of the before and after model
7 were reliable and he was -- and this is the key; okay? If
8 it were reliable, it means that he has been successful at
9 isolating the effect of "war on the shore" on growers' pay.
10 Then the model, as I indicated before, should have shown a
11 higher rate of increase of pay in Delmarva relative to the
12 rest of the country.

13 Now, at least according to the Singer's theory, he
14 essentially -- let me fast-forward to what Dr. McCrary has
15 demonstrated. Dr. Singer's own regression -- and to
16 rephrase a point -- when applied to the data from outside of
17 Delmarva -- finds that the grower pay outside of Delmarva
18 increases much or more than the increase in pay at the
19 Delmarva plant.

20 Now, this shows that the regression -- and this is
21 a key phrase, Your Honor -- it's not capable of isolating
22 the effect of the alleged collusion, because it provides no
23 support for the claim that the breakdown caused the pay to
24 increase in Delmarva during the "war on the shore." And it
25 also means that the regression does not support his opinion

1 that the alleged no-poach agreement caused the grower pay to
2 be suppressed in Delmarva or outside Delmarva before the
3 "war on the shore."

4 Now, Dr. Singer criticizes the
5 difference-in-difference test because McCrary uses only pay
6 data for the integrators that also have plants in Delmarva.
7 But that is precisely what is required under basic economic
8 theory to have an untreated comparison group that is very
9 similar to the treatment group. Here, integrators with
10 plants in Delmarva and plants outside Delmarva.

11 THE COURT: Wasn't there -- wasn't there also a
12 time break that Dr. McCrary employed here? Or am I
13 confusing the tests now?

14 MR. TORRES: Well, Your Honor, there is a time
15 break in one of the models, and it essentially deals -- what
16 he calls a -- I think it's an arbitrary structural break.
17 There's nothing arbitrary about it and there was no break.
18 I mean, that was just premised on the model that he -- that
19 he specified for conducting his regression, which is that
20 there's a before and after period. So all he did was
21 basically follow the same structure of the model that had
22 been constructed by Dr. Singer.

23 Another criticism is that Dr. Singer -- or that
24 Dr. Singer claims that Dr. McCrary failed to include state
25 and regional fixed effects, but that's not relevant here.

1 Dr. Singer's own regression results in Appendix Tables 12
2 and 13 show that the inclusion of a state and regional fixed
3 effects makes no material change to the grower pay.

4 Now, let me turn to the second fundamental flaw in
5 Singer's regressions. And as we note and discussed before,
6 Your Honor, they have to be considered together. It's his
7 falsification test. And there's a standard falsification
8 test that was run by Dr. McCrary. And a falsification test
9 is a standard tool that's used by economists to test the
10 reliability of regression by applying the regression to data
11 where you know no impact should be found.

12 For example, if -- suppose you want to put a new
13 COVID test on the market, but you first want to assess how
14 good the test is at detecting COVID. One way to do that is
15 to give the test to a room full of people that you know do
16 not have COVID. If your test shows that everyone has COVID,
17 then you know you have a bad test. It couldn't be clearer.
18 And this is the kind of -- conceptually, the kind of
19 falsification test that McCrary has performed.

20 THE COURT: How do courts on this subject matter
21 -- on this issue about falsification tests, haven't courts
22 recognized you find a good expert economist, they can run a
23 test using any model that will show that the results are --
24 will yield absurd results. That this isn't a way to
25 disprove the reliability of a model. It's a way to

1 illustrate weaknesses in it, perhaps. But the fact that you
2 can plug in specific data in a specific way and get an
3 absurd result doesn't -- doesn't itself establish that the
4 test is unreliable?

5 MR. TORRES: Yeah. Your Honor, I do not disagree
6 with that at all, but the point is, this is another piece of
7 the equation here that is speaking toward this fundamental
8 failure to isolate the effect of the alleged conspiracy
9 here. But if that's all it was, just the falsification
10 test, agreed.

11 Now -- so let's go back to just finish up on the
12 falsification test. What he does is he uses Dr. Singer's
13 before and after model, using grower pay for plants not
14 associated with the "war on the shore," same model, but just
15 a set of data where you have plants that are not associated
16 with the "war on the shore." If the model was reliably
17 isolating and measuring the effect of the "war on the shore"
18 -- which is exactly what he's saying -- after the breakdown
19 of the no-poach agreement, his methodology should find no
20 effect to grower pay outside Delmarva. Common sense.
21 But the model fails this test, and it finds material
22 differences even among these plants.

23 And this is shown in Exhibit 28 of McCrary's
24 report, at paragraph 16, where he does a comparison of Dr.
25 -- of Singer's before and after results to a version of the

1 same regression using all plants, including those outside of
2 Delmarva.

3 THE COURT: I know this is in the papers, but will
4 you say that again? It's exhibit what?

5 MR. TORRES: Exhibit 28, Your Honor.

6 THE COURT: 28.

7 MR. TORRES: This is Dr. McCrary, paragraph 116,
8 page 91.

9 THE COURT: Thank you.

10 MR. TORRES: Now, the falsification test finds the
11 same patterns for grower pay at plants in Delmarva as well
12 as plants outside of Delmarva. Those results show that the
13 increase in pay could not have been the result of the "war
14 on the shore" purportedly breaking down. This, again, shows
15 that Dr. Singer's model is unreliable because he fails to
16 isolate the effect of the alleged no-poach agreement.

17 Now, Dr. Singer criticizes the falsification test
18 because it supposedly claims -- and this is what you were
19 alluding to before, Your Honor -- an arbitrary structural
20 break in the data for non-Delmarva integrators at the
21 beginning of the "war on the shore."

22 But I mentioned before, that's not correct.
23 Dr. McCrary's falsification test was properly based on
24 replicating Dr. Singer's before and after model, which
25 includes the structural break at the beginning of the "war

1 on the shore," and there's nothing arbitrary with this
2 inclusion in the non-Delmarva data used in the falsification
3 test.

4 The third fundamental flaw in Dr. Singer's
5 no-poach regression is that he assumes the results of his
6 regression -- and the results is that there's -- there was a
7 4 percent wage suppression across the board for all, more
8 than 24,000 growers. He assumes that can be extrapolated to
9 all plants located throughout the country. And that's the
10 basis for his assumption. It's based on an extrapolation.
11 And it has to be based on an extrapolation, Your Honor,
12 naturally, because the actual analytical work and the
13 economic work is based just on data from Delmarva.

14 Now, Dr. Singer assumes that you can extrapolate
15 the results to growers in areas of the country where there
16 was only one company operating, and the grower could not
17 have been subjected to a no-poach agreement, or where the
18 grower never had any interest in switching companies.

19 In fact, Your Honor, five of the eight named
20 plaintiffs in this case were located in an area with only
21 one integrator, and the other three explicitly testified
22 that they never had any interest in switching integrators.
23 None of these speculative and unsupported assumptions are
24 supported -- of Dr. Singer's -- are supported by any
25 reliable methodology or other economic analysis.

1 His speculative assumptions are unsupportable
2 because his no-poach model is limited, as I said, to the
3 grower pay data of the five companies in Delmarva. And the
4 data relates only to the ten Delmarva plants and does not
5 include the data from the other 137 plants outside --
6 outside Delmarva.

7 Now, even assuming that Dr. Singer's model had not
8 been flawed, that the most that he might be able to say is
9 that any impact from the alleged no-poach agreement may
10 possibly be limited to some growers in Delmarva. That's the
11 confines of that particular model. But, nevertheless, what
12 he does, he makes the quantum leap and assumes that the 4
13 percent pay suppression that he estimates for those Delmarva
14 growers would apply to all the growers in the country, more
15 than 24,000.

16 And for this, he's basically concluded -- and this
17 is another -- I'll get back to the Latin phrase, this is
18 based on his that based upon ipse dixit -- that the pay of
19 every other grower -- that's 90 percent of growers, in every
20 other part of the country, irrespective of the competitive
21 dynamic, irrespective of whether you only had one integrator
22 and there was no -- not even a possibility for switching,
23 they had their pay also uniformly suppressed.

24 Now, let's turn to the basis for this
25 extraordinary extrapolation. The entire basis for

1 Dr. Singer's extrapolation assumption is set forth in a
2 single paragraph of his report at paragraph 231. And it
3 consists of nothing more than certain superficial,
4 high-level comparison of averages of certain grower-related
5 metrics such as pay per pound, number of chicks placed per
6 flock, feed conversion averages, and other grower-related
7 statistics.

8 He simply looks at the Delmarva averages and the
9 nationwide averages, looks at both, compares them, including
10 Delmarva, and then he concludes that the similarity in those
11 high-level averages, that comparison, that alone, is a
12 sufficient basis to justify his sweeping conclusion that the
13 exact same 4 percent pay suppression in Delmarva would have
14 been transmitted to exactly the same degree to all growers
15 in the rest of the country, irrespective of the
16 circumstances. That's it. That's the basis for the
17 extrapolation. And the rest of the country, as I mentioned,
18 we're talking about for 90 percent of the growers.

19 THE COURT: Is that a -- is that a criticism that
20 goes to Dr. Singer's conclusion that all of the growers felt
21 some injury or is it a criticism drawn to his calculation of
22 the amount of the injury for each grower?

23 MR. TORRES: Well, Your Honor, the --

24 THE COURT: Is it the fact of damages or the
25 amount of damages?

1 MR. TORRES: It's -- we're talking about impact.
2 We're talking about impact here, Your Honor. That's -- this
3 is one of the threshold and critical issues, as you know, in
4 a Sherman Act case, is impact. That's what we're talking
5 about. And he's -- this is being used affirmatively for
6 impact purposes. Of course, it also has consequences down
7 the line in damages, but at this threshold issue, that's
8 what we're talking about, impact. This is what sweeps in
9 the more than 24,000 growers.

10 THE COURT: I think the defendant -- I think
11 Pilgrim's argues in its papers -- do I have this right? --
12 that about 15 percent of growers in the class are in a
13 geographic area where there's only one integrator.

14 MR. TORRES: Correct, Your Honor.

15 THE COURT: Doesn't that mean that 85 percent of
16 the growers are in areas where there is more than one
17 integrator?

18 MR. TORRES: Well, what it means, Your Honor, is
19 that there are areas of the country where there are
20 variances even with respect to the level of concentration of
21 companies in different regions of the country. So, of
22 course, there's some where it's more than one, there's some
23 where it's two, there's some -- and Dr. McCrary has a chart
24 in his -- in his report that lays out, you know, with some
25 specificity, the different levels of concentrations in the

1 different parts of the country.

2 THE COURT: And on impact, I understand Pilgrim's
3 to take the position in its papers that there's a broad and
4 firm rule that if more than 5 or 6 percent of the class is
5 uninjured, that you don't certify a class. I don't see that
6 in the Tenth Circuit or from the Supreme Court. I don't see
7 any binding authority for that proposition. And, in fact,
8 didn't the *Black* case out of the Tenth Circuit -- I'm trying
9 to remember now. I think it was *Black*, in the Tenth
10 Circuit, Judge McHugh's decision -- acknowledge there were a
11 significant number of members of the class who likely
12 weren't harmed, but that didn't prevent certification.

13 MR. TORRES: Your Honor, there have been different
14 decisions, and there is no uniformity on this and, we agree,
15 but there is authority for -- and there's no Tenth Circuit
16 case, but there is authority for the proposition that when
17 you have that, that that's more than de minimis. Here is 15
18 percent and that's more than de minimis. And courts have
19 found that that is sufficient for purposes of determining
20 that that just is too -- that percentage is just too high to
21 justify certification.

22 THE COURT: what do I do with -- I believe I'm
23 required to assume the truth of the plaintiffs' well-pled
24 allegations in their complaint, and there's factual support,
25 at least in -- we'll get to summary judgment. It looks to

1 me on this incomplete record that we have at this stage,
2 that there is sufficient evidence from which a jury could
3 conclude that there is a conspiracy, a nationwide conspiracy
4 among the integrators.

5 And if that's true, as a matter of economic
6 principle, why would the integrators engage in a nationwide
7 conspiracy if all of these considerations of grower pay were
8 only as isolated and localized as you're suggesting?

9 Have I articulated that question well enough to
10 convey my concern? I feel like that got confusing.

11 MR. TORRES: Well, Your Honor --

12 THE COURT: Why would you have this conspiracy --
13 if the plaintiffs can prove up this conspiracy, why does it
14 exist, if integrators don't need to have some agreement
15 among themselves nationwide, if they can really control
16 grower compensation on a plant-by-plant, local-by-local
17 area?

18 MR. TORRES: Well, it's not that they can control
19 the compensation, Your Honor. It's that in order to
20 determine grower pay, that you have to look at the different
21 regions to see what the level of competition is among the
22 companies.

23 And in connection with the point that I was making
24 before about the different concentrations across the country
25 of companies, that speaks directly to the issue of what the

1 degree of competition there is in different markets.

2 If you have two -- Delmarva happens to be an
3 example of a case where you have five integrators, which is
4 on the higher end of the concentration among the
5 integrators. But that really goes to the issue of whether
6 the underlying claim here is even -- and this goes to the
7 relevant market issue -- whether you have to appreciate the
8 fact that these are local markets. And you have to -- local
9 decisions and the grow pay determinations are based on the
10 local dynamics within each of those markets.

11 And in connection with the -- you know, with
12 whether there's enough here for purposes of showing that
13 there is a -- kind of overarching agreement -- we obviously
14 disagree, you know, strongly with that, Your Honor, because
15 we think that the record obviously does not show that. And
16 we think, in fact, that the record -- that once you start --
17 and Mr. Kasowitz is going to address some of this tomorrow
18 -- once you start seeing some of this evidence that -- that
19 they claim shows evidence of the overarching conspiracy,
20 it's a house of cards.

21 I mean, it's basically -- what they have, at best,
22 are some episodic, handshake deals in regions between two --
23 one or two plant managers, that we'll stay from each other's
24 growers, handshake deals, gentlemen's agreements -- that's
25 the way they're referred. It's a leap to jump from those --

1 those handful of agreements, it's a leap to argue that that
2 constitutes evidence of a nationwide conspiracy,
3 particularly when one of the vehicles that they're using is
4 the information sharing through Agri Stats.

5 So, Your Honor, we just -- you know, respectfully,
6 on that issue -- and you'll hear about it more tomorrow -- I
7 don't even think they get to that -- you know, I don't even
8 think they pass that threshold.

9 THE COURT: What --

10 MR. TORRES: And, Your Honor, if I may --

11 THE COURT: You've cited --

12 MR. TORRES: I'm sorry.

13 THE COURT: You've cited, collectively, dozens of
14 cases in your papers. I've read lots of cases. I can't
15 tell you I read all of the cases you've all cited. What
16 cases do you point to, Mr. Torres, that you think best
17 support this question about the reliability of applying an
18 isolated study to a broad national impact?

19 MR. TORRES: Well, Your Honor, if I may, just for
20 one moment, on that question, just to tie the loop on the
21 last question.

22 THE COURT: Sure.

23 MR. TORRES: The *Black* decision out of the Tenth
24 Circuit essentially held that a significant -- this is a
25 quote -- "a significant portion of members who for some

1 reason could not have been harmed by the defendant's
2 allegedly unlawful conduct is defined too broadly to permit
3 certification."

4 So, actually -- I misspoke earlier. The Tenth
5 Circuit has adopted what had been -- and it was until very
6 recently, it had not been expressed, but they adopted what
7 had been and still is the Seventh Circuit reasoning in
8 connection with that issue.

9 THE COURT: I'm not sure that's right. The Tenth
10 Circuit in that case affirmed Judge Freudenthal's decision
11 to certify a liability-only class, acknowledging that there
12 were some unknown number of people in the class who likely
13 were going to be unable to establish damages, preserve the
14 damages issue, and that was not an impediment to class
15 certification in the Tenth Circuit's view, as I remember
16 that case.

17 MR. TORRES: Well, Your Honor, as I recall, it was
18 that if there's a significant number, that that was -- you
19 know, and maybe in that case, did it hit the threshold? But
20 at least as standard, it was expressed that -- and it gets
21 -- you know, the devil is in the details of what's a
22 significant number that precludes certification.

23 THE COURT: Fair enough. Do you have my last
24 question in mind because, now, I don't? I guess --

25 MR. TORRES: Okay. Your Honor -- yeah, on your

1 other question, look -- I mean, it's obviously an issue that
2 has to be decided at the class cert -- and this is --
3 obviously, Mr. Kasowitz is going to address this. But
4 unlike at this hearing on the 702, under Rule 23, in the
5 class cert hearing, there's a more rigorous standard that's
6 applied. And that more rigorous standard, you know,
7 empowers you to actually dig into the merits to the extent
8 necessary to resolve the class certification issue. And
9 Mr. Kasowitz will address this tomorrow in connection with
10 that precise issue that you just raised.

11 THE COURT: Well, then let me -- let me refine my
12 question and be more precise. It seems to me that the only
13 way I can proceed through the analysis you've given me is to
14 evaluate the extent to which each of these criticisms,
15 taking into account Dr. Singer's rebuttal to the criticisms,
16 collectively, if it crosses some threshold of reliability
17 where it has to be excluded. And so this specific instance,
18 this criticism about extrapolating nationwide from a
19 regional study, this has been done before. In my mind, it
20 goes to -- my first question is does that go to the strength
21 of the opinion or its core reliability?

22 And so I'm asking where a case is that says, no,
23 you can't do that. Not that -- not that it's unreliable
24 because you didn't take into account certain factors, but
25 that's a -- that's a hard stop.

1 MR. TORRES: Well, Your Honor, first of all, of
2 course, plaintiffs bear the burden of justifying the
3 extrapolation through some reliability methodology. And in
4 terms of a case that says that, that's the Northern District
5 of Illinois decision in *Farmer v. Directsat*.

6 And here, as I've indicated, there is no economic
7 analysis to justify that extrapolation. And that failure is
8 particularly egregious in light of the plaintiffs'
9 concession, on pages 6, 10, and 16 of their reply brief,
10 that local, state, and regional factors affect pay.

11 The other decision out of California, Your Honor,
12 *Kamakahi*, also stands for the proposition that an expert
13 that proposes a regression model that applies -- and I can
14 discuss -- I was going to discuss the specifics of it, but I
15 can do it now and give you some of the facts of that case.
16 And this is a California case, 2015. It's a horizontal
17 price-fixing case in the Northern District of California.

18 And in this case, Your Honor, the plaintiffs
19 relied on Dr. Singer's regression, and they relied on
20 Dr. Singer's opinion and evidence of class-wide impact and
21 damages. And just to give you some of the details, because
22 I think they're relevant in terms of drawing this point out,
23 the plaintiffs in that case were human egg donors. And
24 their claim essentially was that they received artificially
25 suppressed compensation because of an alleged unlawful,

1 horizontal price-fixing agreement.

2 And the agreement there -- just so that the
3 context and the comparison is clear -- in that case, there
4 was no dispute about what the agreement was. I mean, here,
5 of course, that's hotly disputed. But in that case, the
6 agreement -- there was an industry association -- and the
7 industry at this time consisted of like 390 clinics and
8 agencies that participated in this human egg donor program.
9 And they -- trade association meeting, they came up with,
10 quote/unquote, guidelines limiting the pay that would pay to
11 human egg donors to 5- to \$10,000. So they had a clear
12 agreement, a clear restriction, in terms of a restraint.

13 Now, plaintiffs brought in Dr. Singer. He
14 conducted his magic with the regression, and he offered an
15 opinion that they used in terms of trying to show both
16 class-wide impact and damages.

17 And another similarity that is kind of
18 interesting, Dr. Singer's regression was based on what he
19 considered a natural experiment. Another natural
20 experiment. This one was that three of the 390 clinics and
21 agencies had followed the guidelines for a certain period of
22 time, but then they changed course. They disavowed the
23 guidelines and did not continue to follow them. The classic
24 before and after period, the same construct the doctor used
25 -- Dr. Singer uses in this case.

1 In that case, he did exactly what he did here, a
2 before and after model, and he prepared his regression. And
3 what did it find? It found uniform suppression of pay to
4 these -- to the plaintiff, to the entire class.

5 So, basically, he extrapolated from the model
6 based on three -- in this case, there was three. That was
7 the natural experiment. In our case -- and in *Kamakahi*, it
8 was three. In our case, it's five. That's the difference.
9 And so he said he could extrapolate to all the agencies.

10 But just like Dr. Singer, if you look at his
11 report, there's no -- I mean, there is no economic analysis
12 or principal basis for him to predicate his assumption
13 concerning extrapolation. He doesn't do anything. He had
14 no basis at all.

15 And the defendants in that case, as we're arguing
16 here, they said, well, look, you cannot use Dr. Singer's
17 analysis to show that all these class members were injured
18 because he couldn't reasonably or reliably -- you know,
19 those results with the three couldn't be reliably applied to
20 the clinics and agencies in light of the absence of the
21 information that he had done to justify that extrapolation.
22 And the Northern District of California agreed. It excluded
23 and struck Dr. Singer's opinion and regression because it
24 was based on data from only three agencies and because of
25 the absence of any legitimate basis for extrapolation.

1 The same outcome, Your Honor, is appropriate here.

2 Now, Your Honor, unless you have any other
3 questions, I was planning on moving to the pay structure
4 regression.

5 THE COURT: Just one moment, please.

6 You and I are both moving at a decent clip in our
7 discussion, which I know is taxing for a court reporter, and
8 we've been going to about an hour and a half. This seems
9 like a natural place for us to break. Let's try to keep it
10 short, maybe ten minutes, and come back, and let's pick up
11 where we're leaving off.

12 Thank you. We'll be in recess.

13 MR. TORRES: Thank you, Your Honor.

14 (Recess taken.)

15 THE COURT: Mr. Torres, you were just about to
16 transition our discussion.

17 MR. TORRES: Thank you, Your Honor.

18 I want to turn now to the pay structure
19 regression. And the pay structure regression, according to
20 Dr. Singer, shows that grower compensation moved together,
21 in lockstep, across all complexes, all integrators, all
22 regions, and the entire industry. And that a change in one
23 location is transmitted to growers in all other geographic
24 locations. That's at paragraphs 255 through 263 of
25 Dr. Singer's main report.

1 Now, the existence of a rigid compensation
2 structure across the industry, according to Dr. Singer,
3 would -- and this is quoting precisely from his language --
4 "would transmit the artificially reduced compensation," and
5 then -- he's obviously referring to from the regressions --
6 "broadly across the class." That specific language is at
7 paragraph 255 of Dr. Singer's report.

8 Now, in an antitrust case alleging a nationwide
9 agreement or scheme among companies to suppress pay, the
10 standard that must be satisfied to show common impact is a
11 pay structure across the entire grower industry nationwide.

12 The standard was summarized in the *Railway*
13 *No-Poach Antitrust* case. There, the court, in the western
14 District of Pennsylvania, held that the plaintiff must
15 present evidence that the "compensation structures" of the
16 defendants in the pertinent industry were so rigid that the
17 compensation of all class members were impacted.

18 THE COURT: Yeah, I read that case. I know that
19 that's what the Court said in that passage after evaluating
20 some other cases. I'm not -- that case is not very
21 persuasive to me. None of it's binding authority on this
22 Court in the Tenth Circuit, none of it's from the Supreme
23 Court. I'm not sure that that's a misreading, but it seems
24 like an overstatement of a standard drawn from some other
25 districts.

1 I don't think you're going to convince me that the
2 required proof on this point is that kind of rigidity.

3 MR. TORRES: Yeah.

4 THE COURT: The plaintiff has to show something.
5 I'm convinced -- I don't think that I'm going to follow that
6 standard.

7 MR. TORRES: Fair enough, Your Honor. This is a
8 standard that's been articulated -- and you're absolutely
9 correct, it's not -- you know, the Tenth Circuit obviously
10 hasn't articulated, but the underlying principle that's
11 animating that standard is the one that we're subscribing
12 to.

13 THE COURT: Well -- and I think it's going to be
14 incumbent on the plaintiff here to establish through expert
15 testimony some correlation or there won't -- you won't -- or
16 the impact won't follow throughout the class in the way that
17 the plaintiff is arguing, I think.

18 MR. TORRES: Correct. Correct, Your Honor. There
19 has to be some -- this is -- whether the Court is persuaded
20 by the precise language of the *Railway No-Poach* decision or
21 not, you understand that this is really their burden to come
22 up with some quantitative methodology for purposes of
23 supporting the conclusion that this pay gets transmitted to
24 the entire class. They have to come up with something. It
25 can't be based on *ipse dixit*.

1 THE COURT: I think you and I are saying the same
2 thing, that the proof has to be that the alleged antitrust
3 conspiracy impacted all the members of the class nationwide.

4 MR. TORRES: Exactly, Your Honor.

5 THE COURT: And the problem here -- I think what
6 you're focusing on is Dr. Singer's analysis trying to
7 extrapolate Delmarva nationwide. Is that right?

8 MR. TORRES: That's exactly correct, Your Honor.

9 THE COURT: I'm listening.

10 MR. TORRES: Great.

11 Now, Dr. Singer's pay structure regression is
12 fundamentally flawed and unreliable for several reasons and
13 -- that I will go through right now.

14 Number one: A simple inspection of the actual
15 grower pay data -- and this is just the first point. But a
16 simple inspection of the actual grower pay data from the
17 relevant period demonstrates that changes in grower pay do
18 not move in lockstep across companies throughout the entire
19 industry.

20 That is demonstrated in Exhibit 31 of
21 Dr. McCrary's main report. And that shows that both grower
22 pay level and grower pay changes in rates varied widely
23 throughout the industry. Now, this is the actual data.
24 This is not data that has been modified. But these and
25 other charts in our class certification brief, at pages 7 to

1 9, show that grower pay and pay changes varied by region,
2 they varied by company, they varied by grower, and they
3 varied by housing class. And, in fact, grower pay even
4 varied across growers of the same company, in the same
5 state, at the same time.

6 That data clearly provides no support for the
7 conclusion that grower pay moves in lockstep across all 147
8 plants in the country.

9 Now, it's a fairly axiomatic point, Your Honor,
10 but when the basic facts and the data in a case contradict
11 an expert's regression results, the regression is very
12 likely flawed.

13 And as the courts have held, pay structure
14 regressions can be used as an aid to interpret the data, but
15 not as a substitute for the actual data.

16 In the *Plastic Additives* case, Your Honor, the
17 Eastern District of Pennsylvania rejected the expert's
18 opinion that a pay structure exists in that market because
19 the graphs show that the actual prices did not behave
20 similarly for all products and all customers.

21 Third, Dr. Singer's pay structure regression, as
22 demonstrated in the report that we submitted from
23 Dr. Saravia, fails a standard falsification test. This is
24 in conjunction with the prior flaws. And as I mentioned
25 earlier, under this test, the regression is applied to data

1 where no impact should be found. If the regression still
2 finds an impact, it means that the regression is not
3 reliable. Here, Dr. Singer's regression finds a pay
4 structure, even when applied to data without a pay
5 structure.

6 So Dr. Singer ran -- Dr. Saravia -- I'm sorry --
7 ran Dr. Singer's pay structure regression over two sets of
8 data. The first consists of two subsets of actual grower
9 data where a pay structure does not exist.

10 And between -- and I picked out some examples for
11 you. Between 2008 and 2019, pay at Tyson's Temperanceville,
12 Virginia, plant increased by 50.7 percent, but increased by
13 only 9.2 percent during the same time period at Pilgrim's
14 Russellville, Alabama, plant. And this is referenced and
15 presented in Exhibit 26.

16 And yet applying to that data, Dr. Singer's
17 regression generates a coefficient of .99, which, according
18 to him, signifies a rigid pay structure under his
19 definition.

20 Another example. Under the same time period, the
21 total pay per square foot at Tyson's Hope, Arkansas, plant
22 increased by 65.2 percent, but decreased at Pilgrim's
23 Chattanooga, Tennessee, plant by 15.8 percent. That clearly
24 cannot consider to be a lockstep pay structure. Yet
25 Dr. Singer's regression here generates a coefficient of .98,

1 which, again, indicates a rigid pay structure. And that
2 analysis is set forth in paragraph 67 and Exhibit 37 of
3 Dr. Saravia's report.

4 Now, Dr. Singer cannot meaningfully respond to
5 these results other than to continue to repeat, without any
6 legitimate support, that there is a pay structure. Further
7 proof that Dr. Singer's pay structure regression is rigged.
8 It's rigged to always find a pay structure is -- when his
9 model is used with hypothetical data that, by design, lacks
10 any pay structure.

11 And there are a number of models that are run by
12 Dr. Saravia, but the one that I think is most significant is
13 one that has a set of data that simulates completely
14 randomized grower pay. In other words, the data structure
15 is structured to not reflect that there has been -- you
16 know, it has been completely randomized, so there's no
17 structure.

18 When applying his model to that data, what he
19 finds is -- also finds that there's a pay structure, also
20 finds that there's a coefficient that's close to one.

21 Now, turning back to *Kamakahi*, also relevant here,
22 Your Honor. In *Kamakahi*, Dr. Singer again opined that there
23 was a rigid pricing structure. This is the human egg donor
24 case that I mentioned. And there is the -- a rigid pricing
25 structure, here's a rigid pay structure. But based on that

1 purported rigid pricing structure, the plaintiffs in
2 *Kamakahi* relied on Singer's opinion to argue that the
3 damages could be proven through common proof.

4 The court rejected Dr. Singer's opinion and
5 testimony concerning a rigid pay structure, and it did so in
6 reasoning that is applicable here. Dr. Singer simply failed
7 to explain how this mechanism works across different clinics
8 and agencies that are not part of the same pricing
9 structure. Here, also, Dr. Singer fails to articulate any
10 of the transmission mechanisms of his flawed pay structure
11 regression.

12 THE COURT: Before you leave that point, what are
13 Dr. Singer's criticisms of Dr. Saravia's calculations?

14 MR. TORRES: Your Honor, those criticisms do not
15 address -- do not go to the heart of the model that she
16 generated because they do not explain how the -- how he was
17 able to generate these results to that type of data. They
18 simply don't respond directly, other than indicating that
19 there's always some possibility that there's going to be a
20 -- you know, that they're going to be results and not
21 consistent with his opinion. But none of those criticisms
22 go to the heart of -- the core of her analysis, which is
23 that all she's doing is applying his regression to this data
24 that is randomizing and, by definition, should not reflect
25 the pay structure.

1 Now, Your Honor, I would like to turn to the
2 information sharing regressions. And I would like to
3 address the fundamental flaws that render Dr. Singer's
4 information sharing regressions unreliable.

5 Those regressions are the sole quantitative
6 support for the plaintiffs' argument that grower pay was
7 suppressed, because all 21 companies entered into this
8 nationwide information sharing agreement with the purpose
9 and effect of suppressing the pay of more than 24,000
10 growers in the country.

11 Now, here, Dr. Singer identified and obtained
12 grower pay data from four third-party integrators whom
13 Dr. Singer claims did not participate in Agri Stats, but
14 otherwise are comparable to the 21 companies.

15 THE COURT: Well, he assumed that fact. He didn't
16 -- he's not testifying.

17 MR. TORRES: Well, Your Honor, in the information
18 sharing, when you're setting it up and you're trying to --
19 you're trying to justify -- when you're trying to justify a
20 basis for a benchmark, you have to make a judgment in terms
21 of whether they're comparable.

22 THE COURT: Well --

23 MR. TORRES: I mean, that's what --

24 THE COURT: No, he doesn't. He can assume the
25 plaintiffs' theory in the case for purposes of his analysis,

1 and if you persuade the jury that the plaintiffs' theory is
2 incorrect, then the analysis falls apart; right? Every
3 expert will say that on the stand. I assumed the truth of
4 the allegation for purposes of my analysis.

5 Cross-examination. And if you -- if the jury
6 disagrees with the plaintiffs' theory, then you agree your
7 analysis doesn't apply? Answer: Yes. Right?

8 MR. TORRES: Well, but, Your Honor, this is --
9 this is more fundamental, because, by definition -- a
10 benchmark analysis, by definition, is supposed to be
11 premised on two comparable comparisons; otherwise, it's
12 completely unreliable. I mean, if you're comparing apples
13 and oranges, it's not going to have any meaningful -- you
14 can testify about it, but it doesn't pass the threshold of
15 reliability.

16 THE COURT: So is it Pilgrim's position that the
17 other four integrators are part of the conspiracy, and the
18 plaintiffs are wrong, and Singer's analysis is incorrect
19 because they were part of the conspiracy that's alleged?

20 MR. TORRES: Well, let me -- let me, if I may, go
21 through, I think this will respond to your question, Your
22 Honor. And let's talk about the four other conspiracies --
23 the four other integrators.

24 Those four other integrators are Holmes, Freebird,
25 Gerber's, and Murray's. Now, he opines that the pay of

1 these four integrator companies supposedly represents a
2 competitive benchmark. That's the whole predicate of the
3 benchmark. In other words, this represents -- this
4 represents the outcomes that you would have in the absence
5 of an information sharing agreement.

6 Dr. Singer's regression finds that after
7 accounting for other factors that could effect pay, the four
8 companies paid approximately 5 to 7 percent more than the 21
9 companies.

10 Now, let me explain why this regression is
11 fundamentally flawed. Number one, the four so-called
12 benchmark companies are not comparable to the 21 companies
13 at issue here. The four companies are small, specialty,
14 niche broiler production companies that differ operationally
15 in many material ways from the 21 companies in this case.
16 And they differ in connection with aspects of their
17 operations that directly impact grower pay.

18 Gerber uses Amish, or Amish, and nonelectrical
19 grower housing. The 150 to 200 chicken houses that grow
20 Gerber chickens are Amish, or Amish, or "old-style growing
21 houses" that are not even connected to modern electrical or
22 energy grids. Gerber also is certified by multiple animal
23 welfare organizations that have stringent requirements that
24 impose additional labor and expenses.

25 Freebird and Murray's are also certified by an

1 organization, the Global Animal Partnership, that has low --
2 special low-density and slow-growth requirements.

3 Freebird -- or Holmes -- moving on to Holmes --
4 uses growers who are members of the family that owns the
5 company, the Lester family, that owns Holmes. Only 5
6 percent of the growers at Holmes are not members of the
7 Lester family. This means that since 2008, Holmes has not
8 needed to recruit or contract any new growers.

9 The four companies also were much smaller in terms
10 of the number of growers. They had an average of 100
11 growers. The 21 companies here, in contrast, had an average
12 of 1,000 growers. The so-called benchmark companies produce
13 fewer pounds of chickens per square feet, which means that
14 the companies need to be paid more on a per-pound basis to
15 ensure that they receive competitive pay.

16 Ignoring these material differences, Dr. Singer
17 focuses on pay per pound, which necessarily leads to
18 misleading results, because he failed to control for the key
19 variable of housing density. Dr. Singer fails to control
20 for density, which is a critical flaw because of the
21 material differences between the four benchmark companies
22 and the 21 companies. And density, so we're clear, refers
23 to the number of birds of growers in the house and is
24 measured in square footage per bird. Singer simply ignores
25 all of the facts and reasons that the four companies are not

1 comparable to the 21 companies.

2 In short, the effect of running Dr. Singer's
3 regression, using total pay per square foot, is that the
4 regression finds the opposite of what he claims. Provides
5 no evidence that the 21 companies in the case paid their
6 growers less than Singer's so-called competitive benchmark.

7 On the contrary, their total pay per square foot
8 is approximately 24 to 32 percent higher than the
9 compensation of third-party integrators, Gerber and
10 Murray's. Nor can Dr. Singer reasonably claim that he
11 cannot use the pay-per-square-foot data in his analysis.

12 In his Delmarva and pricing structure regression,
13 he also uses the total pay-per-square-foot data. It was
14 only in this regression, however, which contradicts his wage
15 suppression opinion, that he elected not to include the
16 total pay-per-square-foot data.

17 Once this fatal flaw was pointed out to
18 Dr. Saravia -- was pointed out by Dr. Saravia, the only
19 excuse that Dr. Singer could present was that he did not use
20 the pay-per-square-foot data for this regression because it
21 was not provided by Holmes and Murray's. But that's not a
22 legitimate excuse because he could have used the data from
23 the companies that did provide the data.

24 In other words, even under Dr. Singer's flawed
25 logic, all four firms are competitive benchmarks, which

1 means that his model should be robust to the inclusion or
2 combination of the four.

3 So after receiving Dr. McCrary's report, what did
4 Dr. Singer do? He ran a different regression that does
5 control for housing density, which he claims still shows pay
6 suppression. But that new regression does not help
7 Dr. Singer because it provides no support for his opinion in
8 this case that the information sharing agreement suppressed
9 grower pay by 5 to 7 percent. If anything, the results have
10 a dramatic effect on the results presented in Dr. Singer's
11 model, reducing the coefficient by 70 percent.

12 And even Dr. Singer admitted at his deposition, on
13 pages 51 and 52, that any variable in a regression that has
14 such an effect on the results of the regression is a key
15 variable. And the exclusion of such a variable renders a
16 model unreliable.

17 Third, the lack of reliability of Dr. Singer's
18 information sharing regression is also demonstrated through
19 another falsification test that was run, this time by
20 Dr. McCrary. This is a test of Dr. Singer's assumption that
21 all four third-party integrators provide a reliable estimate
22 of the but-for pay per pound.

23 Now, if all four provide a benchmark for a
24 competitive rate -- if all four provide a benchmark for a
25 competitive rate of pay, and Dr. Singer has all the

1 appropriate controls, the regression should not find that
2 any of the third-party companies paid significantly less or
3 more than any -- than any of the other third-party
4 companies.

5 Again, the falsification test is a common vehicle
6 used for purposes of testing the reliability of a
7 regression. And for this test, what Dr. McCrary did was he
8 treated Freebird and Murray -- and Murray's as benchmarks,
9 and the other two, Gerber and Holmes, as presumed members of
10 the alleged conspiracy, using the same regression model that
11 Dr. Singer uses to analyze the impact of the information
12 sharing agreement.

13 If the regression was reliable in detecting the
14 effect of the information sharing, it should not have shown
15 any suppression of the grower's pay, because Dr. Singer's
16 criteria for selection of the benchmark integrators were
17 that they were not sharing information through Agri Stats.
18 But the regression finds that both Gerber and Holmes
19 suppressed pay by over 32 percent.

20 Again, this test makes clear that the purported
21 benchmarks are not reliable, and if they were reliable,
22 there would be no difference in pay from each other.

23 THE COURT: And you'll tell me again that
24 Dr. Singer's criticisms of Dr. McCrary's analysis don't go
25 to the heart of the problem with Dr. Singer's analysis, but,

1 among other things, he says, McCrary, your analysis
2 discarded 98 percent of the data.

3 MR. TORRES: But, Your Honor --

4 THE COURT: They're going to have wide variance.
5 And you didn't explain why you picked the two integrators
6 you did to be the conspirators and the two that didn't. And
7 did you -- did you test other combinations of the four --

8 MR. TORRES: Because it doesn't matter,
9 Your Honor. I mean, the entire premise of Dr. Singer's
10 opinion is that all four were competitive benchmarks. So
11 whether he selected two or three, it really -- it doesn't
12 matter. It's irrelevant.

13 THE COURT: And it doesn't matter that 98 percent
14 of the data is, by definition, excluded.

15 MR. TORRES: Well, that's -- that's a function of
16 the nature of the data that was available with respect to
17 this test. It wasn't excluded because, you know, he thought
18 it would skew his test. It was just excluded based on the
19 principal basis that these are the integrators that
20 supposedly were competitive benchmarks.

21 THE COURT: You don't think that's a fair
22 criticism. If Dr. Singer had discarded 98 percent of the
23 data in part of his regression, that it's not relevant. I
24 mean, the point is this. It seems like this -- these
25 arguments in some ways are circular. There's a criticism of

1 Dr. Singer's regression or his analysis based on another
2 expert's analysis, and there's criticisms of that expert,
3 but it's irrelevant because it doesn't address the main
4 problem with Singer's analysis, and we go around.

5 MR. TORRES: Well, except, Your Honor, that the
6 issues and the problems that are being identified are just
7 core to the structure of the model, and it's -- so it's not
8 just a battle of the experts where you could have, you know,
9 a dispute over whether the inclusion of certain variables.
10 This is a core precept of these models, and it's a
11 fundamental requirement for setting up one of these
12 benchmarks.

13 And if all he had was the comparison to the four,
14 I could see that that would probably be insufficient. But
15 it's that in conjunction with all the other information that
16 cumulatively has a very powerful impact.

17 THE COURT: And I think what Pilgrim's would say
18 is you can't build a model that can show nationwide impact.
19 That's probably the short answer. You don't have to prove
20 that. But if you think about the two examples that
21 Dr. Singer set up from 10,000 feet, they both, intuitively,
22 are appealing. They make sense. Oh, there's an area of the
23 country where the no-poach allegedly broke down for a period
24 of time. Well, let's examine that and see what happened.
25 Well, that's evidence of something.

1 Oh, and information sharing. There are
2 integrators who do this work who were not alleged to be part
3 of the conspiracy. Well, we could look at their data.
4 That's interesting. That tells us something.

5 Those are both -- like at 10,000 feet --
6 attractive ways to begin to test nationwide impact.

7 MR. TORRES: Yeah. Except, Your Honor --

8 THE COURT: And you can -- go ahead. You haven't
9 said there's a better or different way to do it, just that
10 -- and maybe this was okay and maybe it wasn't, but the way
11 you designed it's unreliable.

12 MR. TORRES: Well, Your Honor, two responses to
13 that. Number one, in connection with where we are, it's
14 important to understand the context of where these
15 regressions come into play. And Mr. Kasowitz will be
16 addressing some of this tomorrow, but these regressions
17 really constitute their evidence on -- on this transmission
18 of these -- A, on the existence, and B -- A, on the
19 existence of impact and the transmission of that impact
20 throughout the entire class. So that's just -- that's the
21 context in which we're entering this analysis. And then
22 these regressions are just deeply, structurally flawed, and
23 in the -- this is all they have. This is the best and the
24 strongest evidence.

25 You evaluate that, Your Honor, and I think in

1 terms of reliability, the question -- they just do not stand
2 scrutiny, particularly in the light of other decisions that
3 clearly have said that you can have your regressions.

4 And like you suggest today, they may be suggestive
5 or indicative of conduct in a certain direction, but you
6 also need to have some foundational evidence that relates to
7 the evidentiary basis for making the conclusion that there
8 was that collusion. And that first element is something
9 that's completely missing in this case. And it will be
10 developed, Your Honor, but that is one of the fundamental
11 core. So the weight that these regressions are carrying is
12 enormous in this case. It's enormous. And the quality and
13 reliability of these models, as other courts have
14 identified, doesn't cut it.

15 Now, Your Honor, I would like to just quickly turn
16 to the in-sample regression.

17 In *Kamakahi*, Your Honor also excluded -- I forgot
18 to close the loop on the *Kamakahi* case. The *Kamakahi* court
19 also excluded his pricing structure regression.

20 Turning to Dr. Singer's in-sample regression.
21 This regression also is rigged to find that all or nearly
22 all growers were harmed regardless of the underlying data.
23 His in-sample prediction method again fails a standard
24 falsification test because it finds harm, regardless of the
25 data to which his methodology is applied. He ran the

1 regression over data chosen to reflect hypothetical
2 information sharing and no-poach agreements that did not
3 have an impact on grower pay.

4 This is at paragraph 153 of Dr. Saravia's report.

5 Again, if the singular regressions were reliable,
6 they would show no impact. Yet his regressions still finds
7 that over 90 percent of growers would be harmed, even if a
8 hypothetical information sharing agreement had no impact on
9 the growers. And over 83 percent of the growers in Delmarva
10 would be harmed, even if a hypothetical no-poach agreement
11 had no impact on grower pay.

12 In fact, even where the data is constructed to
13 reflect that the hypothetical information sharing agreement
14 increased grower pay by 6.6 percent, Dr. Singer's regression
15 would somehow still find that approximately 75 percent of
16 the proposed class was harmed. And that is set forth at
17 paragraphs 154 and 158 of Dr. Saravia's main report,
18 Your Honor.

19 Dr. Singer's in-sample regression may be
20 mathematically accurate, but it is simply a house of cards
21 and should be excluded because it is unreliable. His
22 principal response in attempting to defend Dr. Singer's --
23 or plaintiffs' principal response in attempting to defend
24 Dr. Singer's flawed in-sample regression is to rely on the
25 fact that certain properly constructed in-sample regressions

1 have been accepted in other cases. But nothing in those
2 cases sanctions the flawed methodology that's baked into
3 Dr. Singer's model.

4 Under Rule 702, the critical issue is whether
5 Dr. Singer's methodology is reliable and whether he has
6 reliably applied it to the facts and data of this case. The
7 fact that some other experts may have properly used this
8 model is irrelevant. And none of those cases involved the
9 same model that Dr. Singer has constructed here, and none
10 discuss, much less bless, the fatal flaw in the model that
11 has been identified by Dr. Saravia.

12 The *Urethane* case, Tenth Circuit, 2014 case, was a
13 classic price-fixing case involving robust evidence -- and
14 this is connected to the point I made earlier -- involving
15 robust evidence of coordinated price increase announcements
16 from the defendants of polyurethane products in a national
17 market and a standardized pricing structure. Nothing at all
18 comparable to those pricing-related facts has been presented
19 here, not even remotely comparable. And this is not a
20 price-fixing case and does not involve a national labor
21 market.

22 *High-Tech*, another case that they rely on heavily,
23 involved a labor market completely different from the local
24 grower services or the local grower market at issue here.
25 It involved a national market for highly-skilled engineers,

1 developers, programmers, and animators. These were
2 highly-skilled or highly-paid positions for which candidates
3 would be willing to relocate from one city to another. And
4 there was extensive evidence that all defendants used formal
5 administrative compensation structures and divided the jobs
6 into bands, zones, grades, and ranges by which they
7 evaluated and paid employees in groups in relationship to
8 one another. Informal job structure systems. This meant
9 that any individual's compensation was necessarily
10 intertwined with that of her peers. This is the language
11 that was used by the court.

12 In addition, the expert in *High-Tech* -- unlike
13 Dr. Singer here -- presented a graph demonstrating the
14 actual pay data which showed that the compensation for
15 different positions tended to move together over time. The
16 expert's regressions corroborated the factual and economic
17 evidence of a rigid price structure.

18 In contrast here, the pay data shows the opposite.
19 It shows that among the 21 integrators, it did not tend to
20 move together over time at all. And the labor market here
21 does not involve highly-skilled, mobile workers in a
22 national market, but relatively unskilled workers, whose
23 farms are within 50 miles of the integrators' plants and
24 work in a local market. And by "unskilled," I mean
25 unskilled in order to enter the market. Obviously, once

1 they enter the market, they acquire skills related to
2 growing. So that -- I'm using the term in that respect, but
3 it's not one where there is this high threshold that you had
4 in the *High-Tech* decision.

5 And Dr. Singer's regressions, apart from being
6 fundamentally flawed, generate results that contradict the
7 basic pay data in patrons, contradict the local nature of
8 the labor market, and contradict the absence of any common
9 grower pay approach among integrators.

10 Moreover, plaintiffs' own cases, *Capacitors*,
11 *Drywall*, and *Olean* hold that an in-sample regression cannot
12 be used on its own to show common impact. The plaintiff
13 also must provide factual evidence supporting a finding that
14 all or substantially all class members were injured because
15 of the alleged anticompetitive conduct. Plaintiffs here
16 have failed to supply any such evidence.

17 Now, plaintiffs argue that Dr. Singer would not
18 use the in-sample regression if the results from step one of
19 his analysis -- that was impact regressions -- did not show
20 injury in the first place. But this purported explanation
21 just avoids responding to Dr. Saravia's showing that the
22 model itself is invalid. Plaintiffs do not dispute that the
23 falsification test was properly constructed and that
24 Dr. Singer's regression fails each of them. His sweeping
25 opinion that the pay of all growers nationwide was

1 suppressed because of the overarching agreement is without
2 any reliable foundation.

3 In his opinion here, it's not unlike that in
4 *Conrad v. the Jimmy John's* case, where this was also
5 presented. And in that case, also, Dr. Singer's opinion was
6 excluded.

7 In *Conrad*, a putative class action, the plaintiff
8 alleged a contractual no-poach provision -- the plaintiff
9 alleged that a contractual no-poach provision violated
10 Section 1 of the Sherman Act. The Southern District of
11 Illinois completely rejected Dr. Singer's regressions and
12 related opinion in 2021.

13 Now, plaintiffs relied heavily on Dr. Singer's
14 opinions, which were based on -- again, on his regressions
15 in support of their class certification motion. Those
16 regressions, according to Dr. Singer, demonstrated that the
17 wages of all employees, at nearly 3,000 Jimmy John's stores,
18 across 40 states, were suppressed as a result of the
19 no-poach provision.

20 Based on Dr. Singer's regressions and opinions,
21 the plaintiffs argued they had provided common evidence of
22 antitrust impact, under Rule 23(b)(3). The Court did not
23 accept it. Finding Dr. Singer's regressions and methodology
24 fundamentally unflawed -- fundamentally flawed, the Court
25 rejected the regressions and excluded Dr. Singer's estimates

1 of impact in that case.

2 The same outcome is appropriate here, Your Honor.

3 Dr. Singer's common impact regressions are fundamentally
4 flawed, they're unreliable, and they should be excluded.

5 The last point I would like to turn to,
6 Your Honor --

7 THE COURT: Just a moment.

8 MR. TORRES: Yeah.

9 THE COURT: Go ahead.

10 MR. TORRES: Thank you, Your Honor.

11 If I may now, Your Honor, I'd like to talk a
12 little bit about market definition. And I would like to
13 discuss Dr. Singer's opinion that there is a nationwide
14 geographic market for broiler growing services.

15 THE COURT: But before you do, let me just ask.
16 Is this -- are we ahead of ourselves, taking up the
17 admissibility of this opinion? Is this -- are you asking
18 for an advisory opinion about this testimony that may not
19 ever be elicited at trial?

20 If we find, for example, that this is -- their per
21 se standard applies, the plaintiffs won't be offering expert
22 testimony about the scope of the market, will they?

23 MR. TORRES: Well, Your Honor, unlike other
24 violations in the antitrust base, like your classic price
25 fixing, bid rigging, and the like, with respect to no-poach

1 -- the no-poach issue, there's no clear-cut standard that
2 the per se rule applies. That's number one.

3 Number 2, this goes really to the issue of impact.
4 It's the issue in terms of -- under the Sherman Act, they
5 still have an obligation to demonstrate that there was
6 impact as a result of this alleged nationwide conspiracy.

7 THE COURT: But isn't -- isn't impact among a
8 nationwide class a different consideration than defining a
9 nationwide market for purposes of the rule of reason?

10 MR. TORRES: Just a second, Your Honor.

11 Your Honor, look, I think that the -- that this
12 really goes to the issue of when you're looking at whether a
13 plaintiff has met their burden of establishing that there
14 has been antitrust harm, you look at what the market power
15 -- what the market -- you're defining the market where
16 they're alleging that harm occurred. So if they're alleging
17 that the harm occurred nationwide, then they have a burden
18 to show, through reliable evidence, that the conduct, the
19 alleged unlawful conduct, impacted adversely, for
20 anticompetitive reasons, the entire class.

21 And in this case, their fundamental problem is
22 that the evidence simply does not support the notion that
23 there's a nationwide class. And if it doesn't support a
24 nationwide class, that's important because it indicates that
25 the issue of impact and harm has to be determined at the

1 local level. It has to be determined grower by grower,
2 plant by plant, to determine whether there was impact.

3 THE COURT: I don't understand what you're saying.
4 I don't mean to be rude. I just don't understand how that
5 relates to the question about whether we're in the right
6 time in the proceeding to take up opinions about whether
7 this is a national market or a regional market or local
8 market. It may be, but -- for example, what you just said
9 about power and monopsony power, monopoly power, or what --
10 it's not in the papers. I mean, the papers touch on this,
11 but you-all haven't briefed that issue, you haven't provided
12 me the case law. I think we're going to be arguing about
13 that at summary judgment, which suggests to me that there's
14 a decision still to be made, which suggests to me that his
15 opinion may or may not relevant in the case, and it may
16 never be solicited.

17 My question is what's the harm in deferring
18 resolution with respect to that opinion until we've decided
19 what standard we're going to apply for trial?

20 MR. TORRES: Well, the harm, Your Honor, or the
21 reason why we should apply it now, because we're operating
22 in Rule 702, we're trying to assess the reliability of
23 Dr. Singer's opinion on this point. That opinion relates to
24 impact across the entire country. So it's important to
25 understand, for purposes of evaluating those regressions,

1 what the market is in reality to show, again, a complete
2 separation, and to show that there's a complete detachment
3 between the facts of this case, between the facts of this
4 grower market, and what Dr. Singer's regressions are
5 purporting to establish.

6 THE COURT: But if he shows nationwide impact --
7 if I accept his regression analysis showing nationwide
8 impact, what more is there to consider at this stage with
9 respect to what the -- how the plaintiffs might define the
10 market?

11 MR. TORRES: Well, Your Honor, the reason is
12 because experts can't escape the requirement to have a
13 rigorous analysis.

14 THE COURT: Sure.

15 MR. TORRES: And part of that rigorous analysis
16 involves delving into an issue that is integrally connected
17 between the claims that have to be proven by the plaintiff
18 and the expert testimony that they're proposing enables them
19 to meet that burden. And the burden we're referring to here
20 is the burden of presenting reliable evidence that presents
21 impact. And then the question is impact where. And it's
22 important to understand what the market is in order to
23 answer the question of impact where.

24 THE COURT: Why? Why is it, and what's the case
25 law that tells me that that's the case?

1 If this is a per se violation, what law tells me
2 you have to define a market and then show the impact
3 throughout the market? This is a nationwide class, as
4 proposed.

5 MR. TORRES: Well, Your Honor, first of all,
6 whether it's a per se violation -- I mean, that's an issue
7 that has not been definitively decided among the courts. In
8 the context of no-poach provisions, some courts have found
9 that the rule of reason applies.

10 So, obviously, if the rule of reason applies, then
11 the issues with respect to the relevant -- the relevant
12 product or services market, the relevant geographic market,
13 market power, the exercise of market power is all relevant.

14 THE COURT: I'm not sure I disagree with anything
15 you said. And the first word, I think, in that sentence was
16 "if." And isn't that the -- I think that's my point. Until
17 we decide what standard we're going to apply, is the
18 question about Dr. Singer's market opinion relevant?

19 MR. TORRES: Right.

20 THE COURT: It sounds like you think it is, and I
21 think I've understood that you think it's tied in some way
22 to showing impact throughout the nationwide class. Are they
23 the same? You think it's -- it's not the same analysis
24 because we would be applying different considerations under
25 the rule of reason. No?

1 MR. TORRES: Your Honor, the response to that was
2 really presented by -- in the *Funeral Consumers* case out of
3 the Fifth Circuit in 2012, where the court rejected the
4 argument that the plaintiffs made in that case. That
5 plaintiffs do not need to prove a geographic market at the
6 class certification stage because the Sherman Act claim
7 requires proof of antitrust impact, which, in turn, requires
8 proof of relevant market. I mean, this is just restating
9 what I mentioned earlier.

10 And *Black* also holds that at the class
11 certification stage, it necessarily begins with defining a
12 relevant market. By definition, that's the purpose of it,
13 in terms of assessing the issues as to whether impact could
14 be possible as a result of certain conduct. So *Black*, the
15 Tenth Circuit held that at the class certification stage,
16 necessarily begin -- the issue necessarily begins with
17 defining a market -- the market.

18 THE COURT: I don't think *Black* said that, but
19 give me just a moment.

20 And, of course, it may depend on the arguments
21 presented by the parties and the potential relevance of the
22 opinions at issue. I agree they have to be scrutinized.

23 You're telling me that you just start -- it's an
24 additional factor, I guess, in addition to Rule 23. But
25 before you decide whether the rule of reason applies, what

1 you do at class certification is define the market. That's
2 part of the certifying process in every antitrust case?
3 Every Section 1 case?

4 MR. TORRES: Well, Your Honor, I mean, if --
5 obviously, in making the -- in doing the analysis under
6 Section 23, the analysis has to be cognizant of what the
7 standard is and what the burden is that the plaintiff has to
8 meet.

9 THE COURT: Sure.

10 MR. TORRES: And so to that extent, it is
11 relevant.

12 THE COURT: What standard applies in this case,
13 Mr. Torres?

14 MR. TORRES: Well, Your Honor, we would submit
15 that under a straight information sharing agreement, it's
16 the rule of reason.

17 THE COURT: Should I decide that today, without
18 briefing from the parties on this question?

19 MR. TORRES: Your Honor, this goes back to where I
20 started in terms of the overarching theory; right? Because
21 the reason we're here and, really, are in -- let's just say
22 uncertain as to which standard applies because you have the
23 different standards. In information sharing, you have the
24 rule of reason. In no-poach, it may be the rule of reason,
25 it may be the per se. we don't know.

1 But because we're operating under this theory, the
2 core theory about this overarching theory that they're
3 working together and they're mutually reinforcing, there's
4 really no clarity, at least at this point, in connection
5 with, you know, what that standard is. But for purposes of
6 certification, purpose of certification, they have to begin
7 with an analysis of the -- of the nationwide class because
8 they're seeking certification of a nationwide class, and
9 they're asserting claims under the Sherman Act, on behalf
10 and in connection with alleged impact to the nationwide
11 class.

12 So, of course, you necessarily have to begin with
13 that kind of an analysis. That's the issue in class cert.
14 whether that's -- and it's not just Rule 23(b)(3) and -- you
15 know, in a vacuum. It has to be considered in the context
16 with the allegations that are being alleged and the claim
17 that's being alleged here.

18 And I agree with you in terms of like the
19 standard, that has not been definitively resolved, but we're
20 working with what we have. We're working with this -- we're
21 working with three theories. Got the overarching agreement,
22 got the no-poach, and we got the information sharing. So
23 those three theories. And now they're seeking to certify a
24 class on behalf of all 24,300 growers in the country, on a
25 nationwide basis, in order to try to inject these

1 regressions to argue that that was impacted.

2 Given the critical nature of that analysis, it's
3 imperative that the Court take a look at the relevant
4 market.

5 And the *In Re Cox* case out of the Western District
6 of Oklahoma also says that you look at the market at the
7 class certification stage.

8 THE COURT: And so that's a consideration under
9 what, 23(b)(3)?

10 MR. TORRES: Yes, Your Honor.

11 THE COURT: Is that where it fits in the class
12 analysis?

13 MR. TORRES: Yes, Your Honor.

14 THE COURT: All right. Okay.

15 MR. TORRES: All right. Now, turning to the issue
16 of market definition, Your Honor, I would like to discuss
17 Dr. Singer's opinion that there is a nationwide geographic
18 market for broiler growing services.

19 Dr. Singer claims that the market is national
20 because new growers are not -- Dr. Singer claims that the
21 market is national because new growers are "not bound by
22 geographic region." He also claims that the market for
23 grower services is national because over an 11-year period,
24 an infinitesimally small number of growers, .01 percent of
25 all growers in the country, moved across state lines. Those

1 are the two bases for Dr. Singer's opinion there's a
2 national market.

3 But his opinion not only ignores the facts and the
4 data concerning the market for growers, it's contradicted by
5 the facts and the data, some of which I summarized earlier
6 at the beginning of my argument and will not repeat here.
7 But it also defies logic, and it's contradicted by basic
8 principles, basic economic principles, and case law.

9 Most simply put, a plant in Nacogdoches, Texas,
10 does not compete with growers with a plant in Delmarva,
11 which is more than 1,000 miles away from Nacogdoches.

12 And as a matter of basic principles of labor
13 economics, the opportunities for growers to switch,
14 integrator companies are limited to the surrounding plants
15 in their local area.

16 The United States Department of Agriculture also
17 has stated that the market for grower services is local, not
18 national, and the reason for this as the USA -- USDA has
19 stated is "because transportation costs for feed, chicks,
20 and birds are significant, total grow-out costs can be
21 reduced by contracting with farms that are near hatcheries,
22 slaughter, and feed facilities."

23 And all of this is, of course, confirmed by the
24 extensive variance reflected in the graphs on grower pay and
25 grower pay trends that we -- we saw earlier, variance by

1 year, by region, by company, by grower, by housing class.

2 And as Dr. McCrary explained in paragraph 130 of
3 his report, if the broiler grow-out service market was
4 national, economic principles would dictate that those
5 graphs would show grower pay convergence because of
6 arbitrage activity. No such convergence ever occurred here
7 throughout the entire relevant period.

8 In addition, no evidence has been presented that
9 any of the named plaintiffs, much less any of the putative
10 class members, ever attempted to leverage and offer at one
11 plant to negotiate higher pay at a different plant in a
12 different region. That's not how grower pay works.

13 And both Dr. Singer and even plaintiffs have been
14 compelled to admit, on page 5 of their class certification
15 brief, that grower pay is set at the plant level, and
16 growers do not individually negotiate pay. And even
17 Dr. Singer admits in paragraph -- paragraphs 265 and 266 of
18 his report that the integrators set pay, quote, within a
19 complex, with all growers at a complex signing the same
20 contract. In addition, the case law categorically rejects
21 the notion that the market for growers is national.

22 Judge Folsom's opinion in *wheeler*, squarely on
23 point and cannot be clearer on the issue concerning the
24 local nature of the market for growers. There, the putative
25 class of growers -- it was not even a national class, but,

1 instead, a class limited to Arkansas and Northeast Texas.
2 The alleged conspiracy was not among 21 companies, but two.
3 And the alleged conspiracy did not involve 147 plants, but
4 only nine.

5 THE COURT: But wasn't the failure in *wheeler* a
6 failure of proof from a lack of discovery in the case?

7 MR. TORRES: Well, Your Honor, in that case the
8 court rejected the plaintiffs' argument -- he rejected the
9 argument that the growers in the putative class were harmed
10 because of their inability to switch complexes. In doing
11 so, the court pointed out that some growers were unable to
12 switch due to geographic limitations, while others were able
13 to do so. And underscoring the local nature of the market
14 and the individual variance among plants and growers, Judge
15 Folsom stated, and I quote: "The resulting conclusion is
16 that plaintiffs are unable to demonstrate this fact of
17 damages without delving into the individualized traits of
18 each complex of growers' locale." And this precisely ties
19 in with what we were discussing earlier concerning the fact
20 of damages or impact. And this is an issue that
21 Mr. Kasowitz was going -- well, you'll be hearing from
22 Mr. Kasowitz tomorrow on.

23 Now, *McDonald's* is an antitrust case that involved
24 -- this is a separate case also relevant here, Your Honor --
25 that involved a no-hire provision, where the plaintiffs'

1 expert -- similar to what Dr. Singer has done here, but it
2 was a different expert -- he opined that the market for
3 restaurant workers was national.

4 Regarding that opinion, the court stated that --
5 and just let me backtrack. First of all, we're dealing with
6 restaurant workers, and the court mentioned that the court
7 -- or held that the -- explained that the reasons that most
8 labor markets are graphically quite small is because of
9 issues concerning movement from the workplace to the home
10 and other local-related issues. And in connection with that
11 opinion, the court found that it "defies logic." That the
12 market for low-skilled restaurant employees was national.

13 And the evidence here, as I mentioned before, is
14 undisputed that no special skills are required to enter the
15 market for growers. In fact, the principles -- this
16 principle from *McDonald's* applies here with even greater
17 force, and the reason is that unlike the McDonald's
18 restaurant employees, the growers here made capital
19 investments in the purchase of land and obviously that
20 reduces the mobility.

21 In short, Your Honor, Dr. Singer's national market
22 opinion should be excluded. It is contradicted by the facts
23 and the data on the market for growers, and he's failed to
24 present any reliable principles or methodology in support of
25 his opinion.

1 Your Honor, for all of these reasons and those set
2 forth in our the *Daubert* motion -- *Daubert* motions, the
3 Court should enter an order excluding the opinions of
4 Dr. Singer.

5 Thank you, Your Honor.

6 THE COURT: Thank you, Mr. Torres.

7 I think -- I think what we should plan to do
8 probably is -- so our court reporter can rest her fingers
9 after about an hour and a half, let's go until about a
10 quarter after 12, and then we'll take about a 45-minute
11 lunch break and get back at it.

12 You have the floor.

13 MR. WALKER: Thank you, Your Honor. I can still
14 say good morning, so I'll say good morning.

15 So no one has really questioned Dr. Singer's
16 expertise. He has a PhD in economics, he's an economics
17 professor at the University of Utah, he taught at Georgetown
18 before, he's published many books and articles. Nine
19 federal courts have followed his opinions in certifying
20 classes in antitrust cases.

21 THE COURT: I'm going to interrupt right now
22 because you reminded me of something. I learned -- I just
23 want to make a disclosure. I learned a few weeks ago that
24 Dr. Singer and I both were participants in an antitrust --
25 I'm going to call it a symposium -- at the University of

1 Utah sometime in the last year. We didn't meet. We weren't
2 on the same panel. I didn't know him. I still don't know
3 him. To my knowledge, I've never met him or spoken with
4 him. I was on a panel with two other individuals. It was
5 entirely unrelated. But it came to my attention after the
6 fact, in preparation of this hearing, that he participated
7 the same day. I was there for my presentation and I left.
8 I just wanted to make a disclosure to everyone.

9 But go ahead, Mr. Walker.

10 MR. WALKER: Okay. Thank you, Your Honor.

11 So nine federal courts have relied on his opinions
12 in certifying classes, including in labor monopsony cases,
13 including in agricultural antitrust class actions. And
14 including, most recently, in the *In re Pork* case, that --
15 the 23(f) petition on class was denied, where Dr. Singer
16 used an in-sample model identical in substance to what he's
17 done here.

18 So what Pilgrim's Pride contests generally are
19 certain methodologies that are just, by their nature,
20 flawed. I would put in that category the in-sample
21 regression and the pay structure regression. They say it's
22 as applied to this case, but the sort of generalized proofs,
23 quote/unquote, that Dr. Saravia does go to the heart of the
24 model itself regardless of how it's applied.

25 Those types of analyses are done in many antitrust

1 class actions, have been relied on in many courts in
2 certifying classes. They're well-accepted methodologies.

3 The second bucket is what we've heard a lot about
4 today, which is the application of certain methodologies to
5 the facts in the case, where Pilgrim's disputes whether it
6 was done appropriately. Dr. Singer rebuts those.

7 We think Dr. Singer will prevail on the merits
8 when this gets to the trial, but, to be clear, *Daubert* is
9 not a merits inquiry. *Daubert* is about whether Dr. Singer's
10 analyses are junk science, whether either the methodologies
11 are so unreliable by their nature that they can't be applied
12 at all in a case, or whether they're so unmoored from the
13 facts of this case as to be unreliable.

14 Dr. Singer here has implemented well-accepted
15 methodologies, he's applied an enormous amount of economic
16 and econometric expertise to the facts of this case. The
17 hundreds of pages of his report, I think, go to this idea
18 that it's very well grounded in the case.

19 He had data from every integrator essentially
20 operating in this country, almost a hundred percent. He
21 looked at an enormous amount of facts and depositions. He
22 had an enormous amount of economic theory. And each of his
23 opinions goes directly to a core issue in the case, was
24 there a conspiracy; did it harm the plaintiffs; and what are
25 the aggregate damages to the class.

1 Just as a housekeeping matter, my colleague, Dr.
2 -- my colleague, Gary Smith -- not Dr. Smith yet,
3 unfortunately for him -- is going to handle the relevant
4 market and conspiracy-related *Daubert* issues. I'm going to
5 handle the impact and damages. We sort of broke it up that
6 way because -- and I think Your Honor was getting at this --
7 we don't really see the relevant market and conspiracy
8 *Daubert* issues as going to class, and you'll hear more about
9 this tomorrow. And I think the *Black* opinion makes clear,
10 those are class-wide issues regardless of how they're
11 resolved.

12 If Dr. Singer's -- if the proof fails on the
13 relevant market and we, for some reason, have to prove a
14 relevant market, that's a class-wide issue. So that's why
15 we broke it up this way.

16 I'm going to dive into the impact and damages
17 issues, if that's okay with you. But if you would rather
18 hear from Mr. Smith first, that's fine.

19 THE COURT: No, it's great, Mr. Walker. Thank
20 you.

21 MR. WALKER: Okay.

22 So the basic *Daubert* framework is -- you know, I
23 don't dispute too much of what Pilgrim's counsel said about
24 that, except Rule 702 mandates a liberal standard of
25 admissibility. The *Daubert* -- or *Daubert*, I guess -- case

1 says that.

2 And the *In re Urethane* said the rejection of expert
3 testimony is the exception rather than the rule. So in order
4 to be admissible, the testimony must be reliable. That does
5 not mean indisputably correct. It doesn't mean that we have
6 to prove on the merits, or ever, that we have to prove with
7 100 percent certainty.

8 As the Supreme Court said in *Bazemore*, the standard
9 is not scientific certainty. The standard is whether the
10 economic evidence or the econometric analysis, together with
11 all the facts in the case, would allow a jury to find in
12 favor of the proponent of the evidence by a more likely than
13 not standard.

14 And as the Supreme Court said, challenges to the
15 implementation of reliable methodologies should be done
16 through cross-examination, showing contrary proof, careful
17 instruction about burdens of proof and the standards of proof
18 at trial. It is not -- the way to deal with disputes among
19 the experts is not to throw out the evidence altogether.

20 So let's look at what Dr. Singer does for his
21 impact analysis. His analysis includes record evidence from
22 this case, information from the public record. A large
23 amount went into the regressions as control variables, for
24 example; extensive citations to economic and statistics
25 literature, and then the numerous statistical analyses that

1 he does, the many variations that he tests of the information
2 sharing regression, the no-poach regression, the pay
3 structure regression, and the in-sample methodology.

4 And I'm going to get into the details in a bit, but
5 Dr. Singer follows what we call a two-step methodology for
6 proving impact. And this is done commonly in cases.

7 *Urethane* is one such case, but we cite a lot of them. It's a
8 very common and increasingly common way of showing widespread
9 impact.

10 In step one, you show -- Dr. Singer shows the
11 alleged anticompetitive conduct caused a generalized
12 suppression of grower pay, an aggregate suppression of grower
13 pay. And in connection with that, he calculates the
14 percentages of pay suppression. Of course, the centerpiece
15 of these analyses -- of the step-one analysis, is his
16 regression models, and I'll get into the details of those.
17 But it's important to remember that they are by no means the
18 only evidence. He analyzes grower switching rates and he
19 analyzes an extensive, class-wide body of evidence from the
20 discovery record as well as economic literature showing how
21 the alleged conduct here generally operates to suppress pay
22 in a labor context.

23 In step two, Singer conducts analyses of the record
24 evidence and the statistical evidence to determine whether
25 there was so much variation in grower pay, that there's a

1 large portion of the class that might have, nevertheless,
2 escaped harm -- escaped the harm found in step one.

3 And he relies on a huge qualitative record about
4 the widespread aspects, the nationwide aspects of the
5 no-poach and the information sharing, the similarities among
6 the integrators and the class members nationwide, the
7 interconnectedness of grower pay, but he also does the pay
8 structure regressions and the in-sample regressions that
9 we'll talk about. And he concludes that all or virtually all
10 members of the class suffered injury in the form of an
11 artificial underpayment due to the alleged conduct.

12 And, again, this methodology has been followed in
13 *In re Urethane*, the package seafood case, which went all the
14 way up to the Ninth Circuit en banc, so suffice to say -- and
15 in-sample was a big part of that -- suffice to say this
16 methodology for proving class-wide impact is well accepted in
17 the world of antitrust class actions.

18 So let's get into the steps. But I see you're
19 about to ask a question here.

20 THE COURT: I mean, I don't -- I don't think I
21 understand Pilgrim's really to challenge the models that
22 Dr. Singer is employing, just his application of them. I
23 agree with you, there are many, many cases acknowledging and
24 applying regression analyses and in-sample methodology in
25 class action antitrust cases. They seem like they're models

1 that economists use. So the question here will be whether
2 Dr. Singer's analysis is faithfully and reliably tied to the
3 data and whether he has designed the models in a reliable
4 fashion that will be helpful for the jury, I think.

5 MR. WALKER: I largely agree with that, certainly
6 for the regressions. I don't think they challenge that that
7 is basically the gold standard in antitrust cases. They say
8 they're not challenging the in-sample, for example, on a
9 generalized basis, but what they say is that -- they say by
10 the very nature of regressions, if you do what Dr. Singer
11 did, you will find widespread impact. And to be clear,
12 that's the wrong way to look at in-sample, but that is going
13 right to the heart of the methodology, saying all those
14 courts that have relied on that methodology didn't realize
15 that it was rigged to find class-wide impact.

16 THE COURT: Well, I guess Mr. Torres and I failed
17 to discuss, one of the criticisms in the papers, I think --
18 I think it's drawn to the in-sample methodology. I think
19 the criticism in the papers was a lack of controls.

20 Am I right about that?

21 I'll ask you, Mr. Walker. You're at the stand.
22 Or am I misreading the defendants' argument, do you think?

23 MR. WALKER: I don't -- I don't think that's the
24 argument because -- because it's wrong, and I don't think
25 they made it, because the in-sample takes the regression

1 from step one, the ISA and the NP -- the information sharing
2 regression and the no-poach regression, and it applies those
3 on a transaction-by-transaction basis to what are called the
4 residuals of the model. And those models have an enormous
5 number of control variables.

6 THE COURT: I'm thinking of the wrong part of
7 Dr. Singer's report then that Pilgrim's criticize for having
8 a lack of controls.

9 MR. WALKER: I think, Your Honor, that's the
10 criticism of the critical elasticity regression.

11 THE COURT: That's right.

12 MR. WALKER: And the -- which Mr. Smith would be
13 happy to talk to you for hours and hours about, if that's
14 what you want.

15 THE COURT: Great.

16 MR. WALKER: Okay. So step one, proof of harm to
17 the -- proof of pay suppression affecting the class. As to
18 the -- Dr. Singer goes through in his report qualitative and
19 quantitative evidence. And if Your Honor wants me to find a
20 citation for you -- some of these are ranges of paragraphs,
21 because I'm generalizing -- I'm happy to do that, but I
22 won't lard up the transcript with all the citations as I
23 talk.

24 But he goes through the many factors that render
25 the market susceptible to collusion, the high concentration,

1 the fact that the products and services at issue are fairly
2 fungible, the constant opportunities to collude through
3 business and social meetings, the employees bouncing around
4 among integrators, the nationwide sharing of information.
5 All of that is class-wide evidence about the susceptibility
6 of the market to cartelization.

7 He reviews extensively the economic literature
8 explaining how information sharing and no-poaches can cause
9 harm to the growers and how that sort of harm would tend to
10 be broadly felt, not limited to the one grower who might
11 have been poached, but there's economic literature about how
12 -- how this harm tends to be broadly felt.

13 And then Singer applies record evidence to
14 analyzing the economic effects in this case, the extensive
15 direct and circumstantial evidence that all co-conspirators
16 participated in the no-poach. All of them shared
17 information through Agri Stats. They shared information
18 directly through interfirm exchanges. The evidence of the
19 integrators using the information that they shared in
20 setting pay. All of this is situated -- all of Dr. Singer's
21 regressions is situated within this evidence that -- that
22 this kind of conduct would tend to cause harm to -- would
23 tend to cause suppression of pay.

24 The quantitative evidence, he conducts two
25 multivariable regression analyses, but for each of these

1 analyses, he does a number of robustness checks, so I'll
2 call it the information sharing regression and the no-poach
3 regression, but really it's a series of tests. And just
4 sort of as a general matter, and this is something that will
5 come up. Regression analyses are the gold standard in
6 antitrust cases. And I agree with you that Pilgrim's
7 doesn't really contest that issue here, nor do I think they
8 could.

9 There is no question that the methodology itself
10 is reliable. And the regression essentially is asking
11 whether a hypothesis, an economic hypothesis, can be
12 nullified through the use of statistics; right? So the
13 regression compares data from -- well, take a step back.
14 The regression looks for -- looks at dependent variable pay
15 and looks at the effect of a conspiracy variable or a
16 conduct variable on that pay, holding constant a vast range
17 of grower-specific, macroeconomic, etcetera, factors that
18 might have also affected grower pay, with the idea being you
19 want to understand and quantify the relationship between the
20 conduct variable and grower pay.

21 And so Dr. Singer goes into these regressions
22 asking the question, can't I -- can I exclude the nullified
23 hypothesis? Meaning, can I exclude the possibility that the
24 conduct had no effect on grower pay? That grower pay
25 changes were just solely related to all these

1 grower-specific and macroeconomic variables. And this
2 allows economists to directly measure the effects of the
3 conduct on the variable of interest, which here is grower
4 pay.

5 And I should say it's also the case that -- and
6 Dr. Singer says this in his report -- that you cannot
7 literally hold all else equal; right?

8 Mr. Torres said earlier, well, it's comparing
9 apples and oranges, comparing the benchmark integrators and
10 the information sharing to the co-conspirators, but the
11 regression is meant to make that apples to apples; right?
12 You're saying -- holding all else equal, can we still say
13 that the reason that the benchmark integrators' pay went up
14 more than the co-conspirators' is because of the conspiracy
15 variable that we're trying to measure.

16 And just to be clear too, Dr. Singer does not
17 assume that the benchmark integrators for purposes of the
18 information sharing regression are comparable. He looks at
19 -- first of all, he acknowledges that they're smaller, and
20 he looks at whether their size is correlated to pay, whether
21 the size of all -- because all the integrators are a variety
22 of sizes. He looks whether integrator pay is correlated
23 with size and finds that it's not. He also runs through --
24 and by the way, that's Singer report, paragraph 211, and
25 note 513.

1 And he also goes through evidence in the beginning
2 of his report about how these benchmark integrators may be
3 smaller, but they're growing the same types of broilers,
4 they're paying contract growers who use grow houses to grow
5 them, they're selling the slaughtered chicken into the
6 marketplace. They are similar in relevant ways to the
7 co-conspirators.

8 And then in the regression, of course, he controls
9 for an enormous number of variables; right? Mr. Torres went
10 through all of these ways in which you would have to look
11 at, you know, well, what -- how many birds are they getting
12 in a flock? where are they located? what was going on with
13 pay for other types of vocations in that area? Dr. Singer
14 controls for all those things in his regression, right? So
15 it's important to understand that it is not apples to
16 oranges. He's very much doing a rigorous analysis to make
17 it apples to apples.

18 And he then looks at the results of the regression
19 to determine whether the coefficients on all the variables
20 that he's using in his regression make economic sense and
21 they do; right? So increased flock size is correlated with
22 increased pay, things like that. So he's not just blindly
23 accepting the results. He opens up the hood of the
24 regression to make sure it's reliable, and, critically, he
25 finds that the conspiracy variable shows a statistically

1 significant and economically significant suppression of
2 grower pay.

3 And he then, as I said earlier, runs a bunch of
4 variations of that to see whether, you know, doing it at the
5 complex level versus the grower level makes the results go
6 the other way. Whether, you know, certain benchmarks need
7 to be included or excluded. He does all those tests. So
8 this is not junk science, and it's not unmoored from the
9 facts of the case. In fact, it's incredibly grounded in the
10 facts of this case.

11 I do want to address now a couple of their
12 information sharing model criticisms that I think are not
13 well-taken. The first is that it fails a falsification test
14 when Dr. McCrary focuses only on the benchmark integrators
15 and decides two are going to be co-conspirators, two are
16 going to be clean, and he says, oh, look, you can tell that
17 these are bad benchmark integrators because it shows that
18 two of them have much higher pay than the other and that
19 doesn't make sense.

20 First -- you mentioned this earlier --
21 Dr. Singer's main criticism is, well, you're throwing out 98
22 percent of the data. Putting aside whether there's a reason
23 for it, a falsification test -- and Dr. Singer sites
24 literature to this effect. I believe it's the ABA -- or the
25 Federal Judicial Center on regression analysis -- that a

1 falsification test or a placebo test should make a small
2 change to the model; otherwise, you can't tell what's
3 causing these changes; right? we know that Dr. McCrary
4 didn't properly test for -- didn't properly control for
5 state and regional fixed effects. we also know that he gave
6 no reason for randomly selecting two of these integrators.
7 And this is an example that I've discussed before.

8 As I said earlier, regression needs to be testing
9 a hypothesis; right? He has no reason -- there's nothing in
10 the record that would suggest that two of these could be
11 co-conspirators and two could be clean. And it would be
12 like adding in the Mets pitching staff ERA and seeing
13 whether that has an effect on grower pay, and if it does,
14 you say, oh, look this model doesn't work. But the question
15 is why would such a regression tell you anything about the
16 facts of this case. And that's the central problem with a
17 number of these so-called falsification tests. They're just
18 playing around with the numbers to undercut or to try to
19 undercut the weight of Dr. Singer's model.

20 And the same is true, although slightly different,
21 for the density variable. They criticize Dr. Singer for not
22 including a density variable in his regression, essentially
23 not including square footage. He already includes the
24 numbers of birds in the flock, which no one has ever been
25 able to explain why a density variable matters other than to

1 recognize that some growers get more birds than other
2 growers, and that might have an effect on pay. Well,
3 Dr. Singer already controls for that.

4 He also acknowledges and cites to Dr. McCrary that
5 pay per pound is a very valid way to look at grower pay. In
6 fact, that's almost all the grower pay contracts are in a
7 pay per pound.

8 And then Singer runs the test, acknowledging --
9 not acknowledging that the way Dr. McCrary does the test is
10 right, but saying, well, even if I run it but include the
11 proper control variables, we still find a statistically
12 significant pay suppression. And this is important here.
13 what Dr. Singer is saying, though, is that in his judgment,
14 it's better to have more benchmark data, which -- as opposed
15 to basically just focusing on Gerber as the sole benchmark.
16 That's what happens if you -- if you try to control for
17 square footage. And he says, in my view, the better way to
18 do it is to have four benchmarks, or three in some
19 specifications of the model, as opposed to just having this
20 little stub of the data. Some huge portion of even the
21 benchmark data is thrown out when you do the -- when you add
22 in the square footage variable.

23 And, Sam, can you put up page 50 and 51 of
24 Dr. Singer's deposition?

25 I just want to clarify something too. Pilgrim's

1 said Dr. Singer -- when Dr. Singer reruns the regression, he
2 finds statistically significant pay suppression, but lower.
3 And they say, well, see, this just goes to show -- and
4 Dr. Singer recognized that if you don't include a variable
5 that changes the economic significance of the result, that's
6 an important variable, and you should have included it.

7 If you could go to page 50, please.

8 And I just want to -- I just want to direct your
9 -- so the question is -- and so Pilgrim's cites the next
10 page of the deposition, but I just want to show that that's
11 not really the story.

12 The question is: "And you said, if that number
13 changes" -- talking about the coefficient on the conduct
14 variable -- "dramatically due to the inclusion or omission
15 of a control variable, then that's a control variable that
16 you would to have in your model; is that right?"

17 And if you could scroll down.

18 He says -- he says, "I have an article on this
19 point I can cite to." He says, "Every regression model
20 that's ever been estimated in the history of mankind has
21 omitted certain variables. The question is, can we live
22 with it? And the answer is yes. The mere fact that you've
23 omitted a variable, it doesn't engender bias in the model;
24 right? It's only a particular -- very type of omitted
25 variable. And I keep coming back to that, and my answer is

1 that I want to know is it motivated in economic theory."
2 Talking about the variable.

3 He says, "Is it motivated in record evidence. Is
4 it available in such a way that we're not going to have to
5 give up 90 percent of the observations." 90 percent of the
6 data. "Then is it statistically significant on its own and
7 does it materially affect the coefficient," etcetera,
8 etcetera.

9 Dr. Singer is saying I considered this, and the
10 tradeoff I made is I would rather have more benchmark data
11 for a more robust model than to throw away almost all the
12 benchmark data to add in this variable that doesn't even
13 really control for anything that isn't already being
14 controlled for.

15 So the no-poach regression. Dr. Singer uses the
16 natural experiment of the "war on the shore" that took place
17 March 2013 through July 2015.

18 You know, a little, maybe, sidebar color here, but
19 there's an enormous amount of direct evidence of the no-poach
20 in this case. And there is clear evidence of a beginning of
21 the "war on the shore" and an end of the "war on the shore."
22 So Dr. Singer's no-poach model is not one of these Mets
23 pitching staff ERA things; right? He is testing the
24 hypothesis, did this, what appears to be a cessation of the
25 no-poach, have an effect on grower pay? And, secondarily,

1 can that be extrapolated nationwide? And the answer is yes.

2 The information sharing model, again, multivariable
3 regression, controls for an enormous amount of
4 grower-specific and flock-specific factors, and he finds that
5 there's a statistically and economically significant effect
6 on grower pay from the conspiracy variable. And then he
7 again tests a number of specifications of this, moving
8 variables in and out and trying to see whether the model
9 holds up. He looks at the coefficients on the variables and
10 finds that they make sense. And then he says, does this
11 apply more broadly? And he does not blindly apply this
12 result he finds in Delmarva to the rest of the case.

13 He, first of all, just looks at the summary
14 statistics of the Delmarva growers and the non-Delmarva --
15 and the nationwide group of co-conspirators and finds that
16 statistically they are comparable, which makes sense because
17 some of those growers in Delmarva have complexes outside of
18 Delmarva.

19 He also notes the many other pieces of evidence
20 that give the benchmark what he refers to from the literature
21 as external validity, meaning is there a sound basis for
22 thinking this applies outwardly. He notes that integrators
23 all produce broilers using contract growers. They all use
24 the same type of grow-out facilities, generally. They all
25 grew under contracts, nearly a hundred percent of which

1 compensate pay per pound. They all use contracts that have a
2 base pay with some additional components added on, and,
3 often, they are the same additional components, things like
4 fuel pay and whatnot. They all use the tournament system.

5 There's evidence -- there's an enormous amount of
6 evidence, circumstantial and direct, that the NPA was
7 nationwide, that it was implemented in the same way as
8 nationwide. There's parallel conduct and conformance for
9 integrators nationwide. He cites all this in his report.
10 There's evidence that all the co-conspirators shared
11 information through Agri Stats and through direct interfirrm
12 exchanges. There's record evidence that they used Agri Stats
13 to set pay, including that they looked at a nationwide
14 average pay, which you wouldn't expect they would do, if pay
15 in Delmarva, say, was wildly different and totally
16 incomparable to pay outside of Delmarva.

17 THE COURT: Well, Pilgrim's says that different
18 integrators use the Agri Stats data for different purposes
19 and used it in different ways. I assume there's record
20 evidence to support that.

21 MR. WALKER: Well, you know, I think we'd have to
22 get into the nitty-gritty, but, for example, they say, well,
23 some integrators used it when they were raising pay. And
24 you look at the evidence, and it's -- they were, huh, should
25 we raise pay? Well, let's look at what other people are

1 doing, right, when we raise pay. Does that mean that
2 they're not using it to suppress pay? I would say not.

3 I mean, the issue is that they're all
4 participating in Agri Stats. Agri Stats gives everybody a
5 nationwide average as well as more specific complex
6 averages, and they're all -- they're all using Agri Stats in
7 one way or another. This is just part of the extrapolation
8 evidence.

9 He discusses evidence of pay structure within
10 complexes, especially due to the tournament system. He
11 discusses record evidence that the integrators would look to
12 other complexes within their own company when setting pay.
13 And, of course, there's evidence of them looking to each
14 other, looking to other integrators, when they're setting
15 pay because of all the direct information sharing and the
16 Agri Stats.

17 And then he also discusses all the evidence of a
18 nationwide market, which -- and then he -- there's the
19 economic pay structure correlation regression, which I'll
20 discuss in a bit. But, in short, this is not a situation
21 where he blindly compared -- he blindly extrapolated to the
22 rest of the marketplace.

23 And this is where it is distinguished from the
24 cases they rely on. For example, one of the cases that
25 Mr. Torres cited was this -- I believe it's called *Farmers*

1 v. *Directsat*. That was a FLSA labor, unpaid wages case.
2 The expert being excluded was a former Department of Labor
3 examiner, who opined on damages. And the first thing the
4 court said was he's not qualified as an expert in statistics
5 to do it. And then it went on to say, he doesn't even look
6 at the underlying data to see whether it's reliable.

7 Dr. Singer spent an enormous amount of time
8 cleaning and verifying the data.

9 That he -- he didn't have any reason to believe
10 that his model -- the -- it wasn't even a benchmark. It
11 wasn't a regression that this guy was doing -- was
12 comparable to the rest of the class.

13 It's not even close to what Dr. Singer is doing
14 here.

15 And then, of course, they cite to *Kamakahi*, which
16 is the egg donor case. In that case, Dr. Singer had data
17 for three out of dozens of industry participants, and he
18 testified and admitted that he did not have a method for
19 showing class-wide impact, but said he could find one.

20 That was common at one time, more common at one
21 time, to go in and say, well, we don't have the data and the
22 evidence, but we'll show you later. And, in fact, that's
23 why we asked for and argued for and eventually you granted
24 the schedule that combine class and merits discovery and
25 class and merits expert reports, because Dr. Singer here

1 shows he has a model. He shows that he has a regression,
2 and he grounds that extrapolation in the facts of the case.

3 And I direct Your Honor to the *National*
4 *Association of Realtors* case, which has a much more
5 disparate set of benchmarks. It was using real estate
6 markets in other countries to estimate damages or damages
7 and conduct in the United States. And what that expert did
8 is he said, okay, what are some relevant parameters. Look
9 at GDP of these other countries, look at corruption levels.
10 And he says, I find that these are a good benchmark. He,
11 frankly -- at least according to the opinion. I'm not in
12 the case so I don't know exactly what the expert did -- did
13 much less than what Dr. Singer is doing here. And the
14 defendants made all the arguments about how there's all
15 these differences between the benchmarks, and the court
16 said, well, that's for the jury to decide whether they find
17 your benchmark probative of harm or not, by, you know, a
18 preponderance of the evidence.

19 I also direct Your Honor to the *SourceOne* case,
20 which we cite, the dental supplies case.

21 There is -- there, again, they were vastly
22 different businesses being used as a benchmark here.
23 They're the same integrators, the same types of integrators
24 doing the same types of things here, being used as a basis
25 for extrapolation. This isn't one of those situations where

1 it's just blindly being done.

2 THE COURT: But it is against the factual
3 background in this case that I think is not disputed, that
4 there is a strong and compelling geographic tie to the farms
5 and the processing facilities in a way that's not -- that I
6 don't -- I don't see a similar analogy in the cases that the
7 plaintiffs' point is to. These growers are largely within
8 50 miles of the processing facilities for reasons that make
9 good economic sense.

10 And there -- maybe there are -- I think -- I don't
11 think anyone disputes local and regional factors unique to
12 each area -- I think Dr. Singer agrees to this -- that
13 affect grower compensation.

14 It's not clear, is it, that -- well, we know. For
15 example, if we're thinking about a market and we're thinking
16 about fungibility or, here, transferability, a grower in
17 Alabama is not -- show me the case where a grower in Alabama
18 went to California because the grower compensation was too
19 low.

20 And I can see, from your colleagues, you have such
21 a case. Okay. But --

22 MR. WALKER: Yeah. I mean, we're sort of getting
23 into the relevant market discussion, actually, and I would
24 say there is -- there is evidence of growers changing
25 locations when they change integrators. So I don't -- I

1 don't want to shade too much into that, because I don't
2 think that's --

3 THE COURT: Let's reserve that question. I'm
4 really focused on the case law. Can you show me one of your
5 cases or point to one of the cases you're relying on for
6 showing class-wide impact in a national market where there
7 are so many strong regional and local factors tying --
8 separating the markets?

9 MR. WALKER: Well, I would say for one, the
10 *National Association of Realtors*. I mean, one of the
11 arguments of the defendants is real estate is, by its
12 nature, a localized industry, and the benchmark being used
13 wasn't even the United States. It was other countries'
14 industries being used as a benchmark.

15 THE COURT: Maybe Mr. Smith will get into this.
16 We can reserve the question.

17 MR. WALKER: Yeah. The -- two points. One is
18 Dr. Singer makes the point -- and, again, I don't want to
19 get into the relevant market, but it's important -- that
20 there's a difference between a relevant antitrust market for
21 showing the ability of the defendants to cause harm and
22 localized nature of labor; right?

23 *High-Tech*, they had -- you know, intel was based
24 in silicon valley and Portland. You had companies that were
25 in various places; right?

1 You have the *Beltran* case, which is in the
2 District of Colorado, which is a -- which involves au pairs.

3 I think there is not a labor case that doesn't
4 involve a certain amount of localization.

5 And as Dr. Singer says, just because there's --
6 just because a cardiologist's pay in New York City might be
7 higher than in, say, you know, Alabama -- to give your
8 example -- doesn't mean that there's not a nationwide market
9 for cardiologists. But pay has local components, and the
10 models control for some amount of the local -- and state and
11 local effects.

12 THE COURT: Well, we're not only creeping into
13 Mr. Smith's area, we're thrusting straight into it, but ...

14 I mean, isn't that example -- I thought -- reading
15 your papers, I thought contrasting growers who build
16 specialized facilities to specifications in a regional area,
17 with whatever skills are involved in growing chicks, that
18 does not strike me as a strong comparison with cardiologists
19 in New York or anywhere else. Cardiologists are going --
20 surely, Dr. Singer would say if he was here, cardiologists
21 are going to move a lot more than growers because they can.
22 Their skills will transfer. The economics of surgeon pay or
23 physician pay, the fact that they're not tethered -- they
24 may be tethered to clinics, who knows, but is that really --
25 is that the metaphor? Is that the comparison that the

1 plaintiffs want to rest on?

2 MR. WALKER: No. I mean, although, I'll say that,
3 you know, we -- Dr. Singer does a switching analysis, and it
4 shows that 40-some percent of growers who switch integrators
5 move.

6 THE COURT: But isn't that an astonishingly low
7 number of growers in a class of 25,000?

8 MR. WALKER: Who switch?

9 THE COURT: I can't remember how many, but it's a
10 -- is it .1 percent?

11 MR. WALKER: The total number of switches is lower.
12 But I'm talking about when growers switch, 43 percent of the
13 time, when they switch integrators, they move to a different
14 -- another farm. Another -- and, again, I can tell Mr. Smith
15 is really champing at the bit to go. But another fact from
16 the case is testimony that growers come -- new growers come
17 from out of state all the time. And so all this goes to show
18 -- well, there's two things. One is this gets into relevant
19 market, right, which is different from impact -- and you were
20 getting at that earlier -- but it -- but putting that aside,
21 like in the -- like in the -- well --

22 THE COURT: Mr. Walker, I'm going to interrupt
23 you. You told me at the beginning of your argument how you
24 and Mr. Smith had divided responsibilities. I want to honor
25 that, and I am -- I mean, we're pulling you into -- let's

1 have this argument once, and why don't Mr. Smith and I have
2 the argument. So go ahead.

3 MR. WALKER: Okay. I appreciate that. I do want
4 to make one last point, though, that the -- if you look at
5 the cases that -- like the *National Association of Realtors*
6 case and the *SourceOne* case -- in fact, *Beltran* says that
7 you just want them to be comparable. The -- for purposes of
8 using a benchmark; right? And so in the *National*
9 *Association of Realtors* case and the *SourceOne* case, what
10 the expert did was decide whether there are some relevant
11 factors that make the extrapolation make sense. And I would
12 say if you read those cases, what *Singer* did here and the
13 facts here go way beyond that.

14 So, yes, there may be some regional differences
15 but for the relevant extrapolation, all those facts I went
16 through, the fact that grower pay is set using the same
17 factors; you know, the nationwide character of the no-poach
18 agreement and the way it was implemented, all of those make
19 for the extrapolation being reliable.

20 Now, whether a jury will ultimately decide that
21 they don't buy that it can be extrapolated that way despite
22 all that evidence, it, to me, seems not the realm of
23 *Daubert*; right? That seems like -- the question is could a
24 jury looking at this piece of evidence, along with all the
25 other evidence, decide that, more likely than not, the

1 growers suffered impact here.

2 THE COURT: Well, surely, it's both at *Daubert*.
3 The Court's gatekeeping function requires me to make some
4 evaluative determination. For example, if you're comparing
5 grower migration with lizard migration, then there's a
6 question about the usefulness and reliability for trial, but
7 your point is well-taken.

8 And I've been so captivated by this discussion,
9 that we have gone 15 minutes longer than I meant to. And I
10 can see smoke coming from the transcription device here, so
11 we'll take 45 minutes, and we'll pick up here at a quarter
12 after one. Thanks, everyone.

13 (Recess taken.)

14 THE COURT: It would be too whimsical and
15 inappropriate, probably, to ask by a show of hands who had
16 chicken at lunch, I assume. I don't know.

17 All right. Mr. Walker.

18 MR. WALKER: All right. Thank you, Your Honor.

19 So I want to briefly go back to talk about the
20 legal standard on the use of benchmarks and yardsticks, just
21 to cite and quote from some additional cases, and then I'm
22 going to move on to the step two of impact evidence, if
23 that's okay with Your Honor.

24 THE COURT: Great. Thank you.

25 MR. WALKER: So I want to revisit some of the case

1 law just to quote from it to seat the discussion in the
2 right way.

3 For instance, the *National Association of Realtors*
4 case says: To demonstrate the reliability of his
5 methodology for choosing comparators, all the expert was
6 required to do was make a "rational" -- this is all the
7 quote, "To make a rational connection between the screening
8 criteria and his selection of comparable markets."

9 And then it quotes the *Blood Reagents* case, which
10 says: "A proposed yardstick must be rejected as
11 inadmissible where the expert testimony is so deficient that
12 the comparison is manifestly unreliable and cannot logically
13 advance a material aspect of the proposing party's case."

14 THE COURT: Will you say that one more time and
15 maybe just a little more slowly. I get worried about our
16 court reporter keeping up when we're reading quotes quickly,
17 So I got distracted.

18 MR. WALKER: A proposed yard -- this is the
19 *National Association of Realtors* quoting from the *Blood*
20 *Reagents* case: "A proposed yardstick must be rejected as
21 inadmissible where the expert testimony is so deficient that
22 the comparison is manifestly unreliable and cannot logically
23 advance a material aspect of the proposing party's case."

24 And in the *Beltran* case, which is in the District
25 of Colorado, it says about benchmarks, which is what the

1 Delmarva integrators are here. While there are -- "while
2 there are differences between any group of workers, in order
3 to be a benchmark, the group has to be similar but cannot be
4 the same."

5 The *Prograf* case says: "Because evaluating these
6 factors in terms of evaluating a benchmark, generally
7 involves weighing facts, deciding whether the plaintiff has
8 met this burden of showing comparability ordinarily is a
9 question for the trier of fact." And that's quoting the
10 *American Bar Association Antitrust Law Developments*.

11 And *Urethanes* also endorses the use of benchmarks.
12 There, the expert had only about 50 percent of the class
13 data -- we have a hundred percent -- for purposes of looking
14 at the summary statistics and whatnot, but the court still
15 found that McClave was able -- the plaintiffs' expert there
16 -- was able to extrapolate damages for the entire class, and
17 that even involved making assumptions about products that
18 were custom-made combinations of the products that were
19 price-fixed that were specifically negotiated and custom
20 priced. And the court found that even his assumptions,
21 built on top of the extrapolation, were acceptable matters
22 for the jury to consider. And that's the *Urethane* case, the
23 discussion in the Tenth Circuit.

24 So here -- and I also wanted to go back and make
25 another point on the facts, which, as you noted, the low

1 switching rates. Just sort of as a matter of explanation,
2 we think that's evidence of the no-poach agreement
3 nationwide; right? The only time the switching rates spiked
4 was during the "war on the shore." So there was a uniformly
5 low switching during the class period and it spiked during
6 the "war on the shore." All right. Thank you for letting
7 me revisit that.

8 So the step two analysis involves both qualitative
9 and quantitative evidence showing that there is -- it is
10 highly unlikely that any class member, let alone a large
11 number, escaped the harm measured in step one during the
12 entire relevant damages period.

13 As to the qualitative evidence of widespread harm,
14 Singer discusses a lot. There is the nationwide character
15 of the information sharing, which we talked about earlier,
16 including Agri Stats publishing, and, at least a number of
17 the co-conspirators, using and looking at, when setting pay,
18 the nationwide average. There is use -- the co-conspirators
19 broadly using it to monitor and set grower pay. The
20 co-conspirators broadly engaging in direct sharing of
21 information -- of grower pay information and using that pay
22 to set their own compensation.

23 He goes through the nationwide character of the
24 no-poach agreement. For every co-conspirator, there is
25 either direct evidence, explicit references to recruitment

1 restrictions consistent with the no-poach, and/or record
2 evidence of parallel conduct in conformity with the
3 no-poach. And we have evidence that we cite in the brief.
4 Dr. Singer cites a lot of evidence where employees,
5 high-level employees, of some of these defendants talk about
6 there being industry-wide practices surrounding the
7 no-poach.

8 Singer also discusses at length the evidence of a
9 nationwide geographic market, which Mr. Smith will get into
10 in a little bit. He discusses the economic theory behind
11 the idea that the no-poach would be expected to have
12 widespread suppression effects. He discusses the
13 compensation structures within complexes, between complexes
14 of integrators, and between integrators, the evidence that
15 they looked to each other when setting pay.

16 So Dr. Singer does these two econometric analyses
17 I'm going to talk about in a second, but it doesn't take
18 place in a vacuum, as I've said many times today. And the
19 question of widespread injury to the class is one where you
20 take in all the evidence and look at it all together to see
21 whether it was likely that more than a small number of class
22 members were likely to have escaped the injury that's
23 already been measured in step one.

24 Okay. So Dr. Singer first performs a pay
25 structure regression, which we heard about earlier, and

1 that's a correlation analysis, basically. And both
2 correlation analyses and the use of regressions is very
3 common in antitrust cases. And I don't think Pilgrim's
4 really disputes that those are reliable methodologies,
5 generally.

6 And -- but what Pilgrim's does is they impose --
7 and there was a discussion about this earlier -- a legal
8 standard based on the *Railway* case that I don't think
9 actually is the legal standard. In fact, the *Railway* case
10 specifically says: "The Third Circuit Court of Appeals has
11 rejected the notion that antitrust injury in an employee,
12 boycott, or no-hire context can never be proven by common
13 evidence. The court of appeals recognized that evidence
14 showing that compensation of the class members was
15 correlated over time may be evidence to show that antitrust
16 injury in a wage suppression case may be proven on a
17 class-wide basis."

18 And there are numerous other cases that talk about
19 this sort of correlation evidence. The *Packaged Seafood*
20 case, the tuna case from the Southern District of California
21 that went up to the Ninth Circuit en banc said: "Although
22 price correlation models cannot prove a conspiracy's
23 existence or common impact on its own, this type of evidence
24 can be helpful in understanding industry behavior and show a
25 likelihood of common impact." And then it talks about how

1 one of the plaintiffs' experts ran correlations across
2 products, products and defendants, and customer types. In
3 each case, he found the correlation coefficients to be high
4 and positive.

5 In *Domestic Drywall*, a case involving arguments
6 that the markets were highly regionalized. That was one of
7 the defendants' main arguments was that every drywall
8 market, based on construction costs and demand factors, was
9 regional, not national. The Court said Dr. Lamb, the
10 plaintiffs' expert, "also presents a correlation analysis
11 which shows the prices charged by the drywall manufacturers
12 are highly correlated with each other."

13 And then in *High-Tech*, the plaintiffs' expert --
14 the Court said: "The plaintiffs' expert showed movement
15 over time of the average compensation of each title with the
16 average compensation of the firm's Technical Class." So it
17 was basically just showing a correlation of averages between
18 job titles and the class broadly.

19 So it's just not true that you need to prove some
20 -- I'm not, frankly, even sure what the standard is that's
21 being proposed by Pilgrim's Pride, but I would say that our
22 pay structure shows that both at a complex level and a
23 grower level, pay moves with the average of the complex, the
24 industry, and the region.

25 And I can -- I can, you know, break that down more

1 if you want exactly those different parameters. But
2 Dr. Singer just doesn't show one correlation. He shows that
3 even when you're looking at correlation of grower pay to the
4 average within a complex, or the average complex within an
5 integrator, or the average complex -- particular average
6 complex pay within the entire industry, he runs this pay
7 structure on multiple levels and finds very high and
8 positive correlations.

9 I would like to also discuss Saravia's arguments
10 against the pay structure regression, why it's rigged. One
11 of them goes to just the use of it, the use of a correlation
12 analysis at all for cases like this, which I think the case
13 law rejects that idea that it can't be used at all as part
14 of the proof of common impact. But this is the -- and there
15 was a little bit of a two ships passing in the night, I
16 think, on the briefing, because what Saravia does is she
17 simplifies Dr. Singer's regression, and he talks about her
18 simplified form. And then she runs the pay structure --
19 then she does a long formal proof over the -- using his
20 actual regression equation.

21 And there's two things that are premises of
22 Dr. Saravia's proof that need to be discussed, because I
23 think they show that there are faulty premises, and her
24 discussion of why it's rigged, it doesn't carry any water
25 here.

1 She says there has to be some sort of trend in the
2 pay. And she says as the number of observations goes to
3 infinity, the coefficient on the correlation is going to go
4 to one. And I would say as to the first premise --
5 Dr. Saravia is talking about this in the abstract as a math
6 problem.

7 Dr. Singer is observing a trend in the pay based
8 on his information sharing and no-poach regressions. This
9 isn't just a hypothetical trend in pay. And, for example,
10 in the information sharing regressions -- in both of his
11 regressions, he controls for macroeconomic trends that might
12 be explaining the trend in the pay. He controls for
13 individual grower differences that might be causing the
14 trend in the pay.

15 So the trend is in -- she assumes a trend as part
16 of her proof, but that's sort of assuming away all the
17 evidence in step one that's gotten you here, that explains
18 what trend we're talking about.

19 And her second point about going to infinity, there's
20 nowhere near infinity. The largest number, I think, is like
21 9,000, and that's when you take the average grower -- or
22 that's when you take the growers' pay and correlate it to
23 the industry.

24 But a number of these correlation analyses have a
25 much smaller number. For example, looking at the grower pay

1 to the average within complexes or within an integrator,
2 you're talking about a couple hundred observations. when
3 you're talking -- when he does a correlation between the --
4 between the complex average and an integrators' average pay,
5 there are maybe five or six observations. we're not talking
6 about an infinite number.

7 So I think that sort of high-level remove from the
8 facts of the case infects a lot of these arguments we've
9 been talking about from the defendants' experts today.

10 Dr. Singer is using the pay structure in the context of
11 having found, controlled for, and quantified the trend in
12 grower pay. He's not just assuming a trend in grower pay.

13 And you see this carry through to Dr. Saravia's
14 other argument where she -- she makes a hypothetical dataset
15 and says, look, the pay here moves all around, but if
16 there's any sort of trend, Dr. Singer's regression picks it
17 up. And it's like, well, yes, he's picking up whether
18 grower pay and complex average pay moves within correlation
19 of a trend. He also happens to measure that trend and
20 identify it as the conduct in this case.

21 So these pay structure regressions should not be
22 looked at just as mathematical proofs, and they should be
23 seated within all the other evidence in this case showing
24 widespread impact.

25 And, second, Dr. Singer runs the in-sample

1 methodology, which, in a nutshell, takes the regression,
2 applies to it to every -- every transaction, finds what's
3 called the "but-for" price, the price that would have been
4 paid but for the conduct the anticompetitive conduct, and he
5 compares it to the actual price paid. And it finds that --
6 with the information sharing regression, for example, it
7 finds that 70-some percent of the transactions suffered
8 harm. And it -- but, importantly -- and this is what
9 Dr. Saravia gets wrong -- you don't move on to the in-sample
10 unless the regressions have found a statistically
11 significant and economically significant effect in step one.

12 So Dr. Saravia says, well, look, regressions have
13 all this noise and if -- even if there is no effect in step
14 one, that noise will show up as widespread impact in step
15 two. And our response to that is, well, the effects in step
16 one, which are statistically and economically significant,
17 show that it is not noise; right? This statistically
18 significant is ruling out -- that phrase is ruling out the
19 possibility that the result of that regression happened by
20 random chance. Dr. Saravia's hypothesized dataset that she
21 runs it on is literally random chance.

22 So step one is already ruled out random chance.
23 And if you had random chance, you would never see 76 percent
24 of the transactions being affected. And Dr. Singer talks
25 about this in his report. He says, if you look at

1 Dr. Saravia's -- if you apply my in-sample to Dr. Saravia's
2 made-up, randomized dataset, you find roughly 50 percent
3 injury, which is what you would expect with random chance.
4 And, basically, if you add up all the over and
5 underpayments, you get zero, which is what you would expect
6 for randomized data; right? It's showing that there is no
7 suppression, as opposed to Dr. Singer's where you get
8 70-some -- 75, 76 percent of the transactions experiencing
9 injury. And you're getting a 6-or-so percent aggregated
10 underpayment, which is how you run the in-sample.

11 And so I would just say that the in-sample
12 methodology -- this exact way of running it has been run and
13 accepted in many cases, including the *Packaged Seafoods* case
14 that went up to the Ninth Circuit, en banc, in the name
15 of *lean*, but also recently in the *Broiler* meat case. And I
16 think we actually attached the relevant part of the *Broiler*
17 -- the defendants' expert, who did the exact same thing
18 Saravia does here. He says, hey, look, if you apply the
19 in-sample to an uninfected dataset, you get 90 percent harm.
20 And the court rejected that because that's a misuse of the
21 regression methodology.

22 And so I think it bears noting, when you look at
23 all of this evidence of widespread impact, the fact that the
24 conduct was widespread across an industry that is fairly
25 uniform, when you see that all of the co-conspirators are

1 participants and participating in the same ways, when you
2 see the evidence of -- the record evidence of pay being
3 linked together, and then you look at that in connection
4 with the two quantitative analyses, Dr. Singer concludes
5 that all or nearly all of the class has been injured, which
6 is -- which is more than the widespread injury standard in
7 *urethane*.

8 THE COURT: Thank you, Mr. Walker.

9 MR. WALKER: Thank you.

10 MR. SMITH: Good afternoon, Your Honor. Gary
11 Smith with Hausfeld.

12 I'm going to be handling the conspiracy opinions
13 and the relevant market opinions.

14 I did sort of want to clarify one thing. When
15 Mr. Torres was talking about the overarching agreement
16 earlier, he made a comment that it's fine for Dr. Singer to
17 talk about the constituent agreements, but not the
18 overarching agreement. I'm just wanting to make sure if
19 that's the current position, because that's inconsistent
20 with the position in the papers, and it can short-circuit a
21 fair amount of my argument if I don't have to defend
22 Dr. Singer's analyses of the no-poach and the information
23 sharing agreements separately.

24 THE COURT: How do you think it's inconsistent?

25 That's what I took away from the papers, was that

1 Pilgrim's is criticizing Dr. Singer's focus on the two
2 subelements of the overarching conspiracy, but offering an
3 opinion about the existence of the overarching conspiracy
4 without adequate support.

5 Did you hear something different today?

6 MR. SMITH: So I thought I did hear something
7 different today. I thought that they were taking a
8 categorical position that an expert economist cannot opine
9 on whether record evidence is consistent or inconsistent
10 with competition or collusion. That's how I read their
11 papers. And that categorical position would suggest that
12 Dr. Singer can't say anything about conspiracy, whether it's
13 overarching or whether it's a constituent component.

14 THE COURT: I don't -- I don't -- we'll hear from
15 Mr. Torres in response, but I don't understand that to be
16 Pilgrim's position, and I don't --

17 MR. SMITH: Okay.

18 THE COURT: And I'm not persuaded by it if it is
19 Pilgrim's position.

20 MR. SMITH: Okay.

21 THE COURT: I mean, the expert has to testify -- I
22 mean, it has to be in the context of the plaintiffs' theory
23 of the case and the data and evidence in the case, and basic
24 economic principles, I think, are things that they can talk
25 about. But maybe I'm misunderstanding -- maybe the ships

1 are crossing again.

2 Mr. Torres, has Mr. Smith just described your
3 position correctly, or do you know?

4 MR. TORRES: No, Your Honor. And I'm not really
5 sure exactly -- oh, I'm sorry.

6 THE COURT: Go ahead and be seated if we need to
7 for a minute so you're by the microphone.

8 MR. TORRES: Yeah.

9 THE COURT: Thanks.

10 MR. TORRES: Okay.

11 No, Your Honor. The point that we're making is
12 that to the extent that he's here -- this is a Rule -- you
13 know, Rule 702 motion. The basis of it is really to exclude
14 an expert who hasn't provided a reliable objective -- a
15 reliable opinion, reliable methodologies, reliable economic
16 principles in order to substantiate the conclusion. And if
17 you look at his report, as I pointed out this morning,
18 there's one sentence that he proffers, which he purports
19 supports the concept of two mutually reinforcing components
20 of a conspiracy.

21 THE COURT: Okay.

22 MR. SMITH: So I think where the confusion is, is
23 that if you look at the list of paragraphs that they're
24 seeking to exclude at the section beginning on page 27 of
25 their *Daubert* brief, it includes every single paragraph in

1 which Dr. Singer references any record evidence of
2 conspiracy in the case. And so I think that is what is
3 driving the disconnect, but maybe I should just go through
4 my argument and make those points.

5 THE COURT: I think an expert can consider that
6 evidence, should consider that evidence, if it's relevant to
7 the opinion that the expert is articulating. But this is
8 where I was fearful that in this category and the last,
9 we've become untethered from the testimony that we're
10 actually going to hear from the expert, which would allow us
11 to make these decisions. When we're talking about a
12 250-page report, we can extract things from a report that we
13 have objection to hypothetically, but -- I'll listen to
14 anything you would like to say.

15 MR. SMITH: Okay. So given what Your Honor has
16 said about the ability of an expert economist to review
17 record evidence, I think I'm going to focus on the points
18 Mr. Torres made about the overarching agreement, and then I
19 will get into the relevant market analysis.

20 So I want to point out just from a legal standard,
21 Pilgrim's doesn't cite a single case excluding any expert
22 economist's offering of a conspiracy opinion, whether it's
23 an overarching opinion or whether it's some other
24 subcomponent of a conspiracy opinion.

25 Mr. Torres brought up that there's nothing other

1 than that one paragraph connecting the two components of the
2 overarching agreement together. Dr. Singer testified, and,
3 in his report, laid the foundation for the fact that these
4 two agreements are mutually reinforcing. Not only in that
5 it doesn't make sense to share information with your
6 competitors if you're -- unless you're also agreeing not to
7 hire one another's growers, but also because they have
8 mutually reinforcing asymmetry -- asymmetry of information
9 components. If you suppress grower mobility, you're going
10 to suppress their ability to learn about wages of other
11 integrators. And if you prohibit -- or sorry-- and
12 obviously the information exchanges are going to create
13 information asymmetries because the integrators have all the
14 information and the growers have none.

15 So we think there's -- it's not just that one
16 paragraph in that one passing reference. There's also the
17 information asymmetry point that's mutually reinforcing.

18 And just -- and this is in our papers, Your Honor,
19 but just as a matter of common sense. It doesn't make a lot
20 of sense that the same 21 companies would be engaged in two
21 parallel schemes at the same time, both with the goal of
22 suppressing grower pay, and that those two schemes were
23 entirely untethered from one another. I mean, it's just not
24 plausible that the same companies would do these things, but
25 then also those things are unrelated from one another. So

1 we think there's just basic logic and economic theory behind
2 the fact that the overarching agreement, that two
3 constituent components were mutually reinforcing.

4 Mr. Torres also brought up a point that we had
5 disavowed the -- any competitive effects of sharing anything
6 other than grower pay data, and that you need to share
7 grower efficiency data in order to know who are the best
8 growers to poach.

9 Well, we've shown in the record -- and this is at
10 footnote 13 of our opening class brief. The integrators
11 were sharing the tournament-adjusted pay rates of their
12 growers with one another, including Pilgrim's Pride and Koch
13 Foods for a period of two years. Those tournament-adjusted
14 pay rates are going to tell you who the better growers are.
15 It tells you who the growers are that are winning the
16 tournament.

17 So it's just not true that there's no factual
18 support that the exchange of pay information has that
19 symbiotic relationship with a no-poach, because they are
20 sharing information, besides performance data, that is
21 telling you exactly who is winning the tournament, who are
22 the better growers, who are the prime candidates for
23 poaching. And, again, that's footnote 13 of our opening
24 class brief.

25 There was a discussion about how -- I guess there

1 was an allusion to the fact that they hadn't developed
2 procompetitive justifications for any of the conduct in that
3 case. I mean, that's just not true. There's plenty of
4 procompetitive justifications in their expert reports.
5 They're not a highlight of the class briefing, but they
6 exist. I'm not sure what they're talking about when they
7 reference the need for a supplemental report.

8 More to the point. Rule of reason isn't a
9 separate claim. It is a mode of analysis. It's a legal
10 standard. There has always been the spectre in this case
11 that this case may be tried under the rule of reason. We
12 don't think that's what should happen, but we've all known
13 it's possible. We discussed it at the motion to dismiss
14 stage. And to the extent that they didn't develop the
15 procompetitive justifications that they needed to develop,
16 that's on them. That's a waiver. That doesn't require
17 opening the record or deciding this issue now.

18 And I think we're going to talk about this a lot
19 more tomorrow, but there was a discussion about *Comcast* in
20 the context of the overarching conspiracy, and I'm just not
21 sure why *Comcast* came up at all. I mean, *Comcast* is a
22 modeling point, and we've addressed *Comcast* by measuring
23 harm separately for the two forms of conduct. I mean,
24 that's the problem in *Comcast*. You have one model for four
25 theories, I knock out three theories, what do you do? We

1 have separate models. So if you knock out one theory, we're
2 good. So I'm not really sure why *Comcast* came up here, but
3 I did want to respond to it since it did come up.

4 THE COURT: For what it's worth, I read *Comcast*
5 the same way. Maybe there's a *Comcast* problem here that
6 might arise. I think what Mr. Torres said ultimately, is,
7 well, we're putting everyone on notice that that may be an
8 issue here and --

9 MR. SMITH: Okay.

10 THE COURT: -- that's fair.

11 MR. SMITH: All right. So I'm going to turn to
12 relevant market unless there's other things Your Honor would
13 like to discuss about the conspiracy opinions. I mean,
14 we've cited in our brief that structure, conduct,
15 performance analysis is reliable. Pilgrim's hasn't
16 addressed any of those cases trying to say that structure,
17 conduct -- sorry -- structure, conduct, performance analysis
18 is reliable methodology in antitrust cases. Those include
19 *Urethanes*. I think we have a strong cite of, I think, nine
20 different cases across the circuit courts.

21 THE COURT: What's the issue?

22 THE REPORTER: I would just ask him to slow down a
23 little bit.

24 MR. SMITH: Yeah. Sorry. I talk fast and I'll
25 try to be mindful of it.

1 THE COURT: You're using big words too, so I know
2 you stringed them together.

3 MR. SMITH: So Mr. Torres didn't address the
4 arguments at page 27 to the end of their *Daubert* brief,
5 which had to do with Dr. Singer's structure, conduct,
6 performance analysis, I take it from Your Honor's comments
7 earlier. We view those attacks as categorical attacks, that
8 experts can't look at the record evidence and evaluate
9 whether it's consistent or inconsistent with collusion.

10 We've cited tons of cases that say that that's not
11 true, that you can do that. That includes *urethanes*, which
12 got affirmed in the Tenth Circuit. I don't plan to spend a
13 lot of time on that, based on Your Honor's remarks, and I
14 think I'll just move on to relevant market unless there's
15 specific questions.

16 THE COURT: I have so many questions.

17 MR. SMITH: Okay.

18 THE COURT: But, no, go ahead, please. I'm not
19 being bashful about raising them in the course of our
20 discussion. This has been a helpful discussion so far
21 today.

22 MR. SMITH: Okay. So there was a lot of talk
23 about local decision-making for grower pay.

24 And, Sam, can you bring up the Jayson Penn
25 testimony, and we may look at the exhibit too.

1 So there is evidence -- and we cite this. This is
2 Exhibit 34 of our class reply -- that every single pay
3 decision at Pilgrim's Pride ran through its CEO, Jayson
4 Penn. These are not localized pay decisions. And to the
5 extent that localized pay decisions bear into a relevant
6 market analysis -- and I'm not conceding that they do -- you
7 know, we have -- unfortunately, he didn't answer any
8 questions about it, Your Honor, because he invoked his Fifth
9 Amendment rights, but the underlying exhibit we examined him
10 on is Mr. Stroud -- who's the highest level executive at
11 Pilgrim's that did not plead the Fifth -- communicating that
12 any grower pay increase or adjustment is going to have to be
13 run by Jayson Penn for approval. So we just don't agree
14 that these are localized pay decisions in this case.

15 There's --

16 THE COURT: You agree that grower pay is -- and I
17 think Dr. Singer agrees -- that grower pay is affected by
18 local and regional factors?

19 MR. SMITH: Absolutely. And we control for that
20 in our econometric analyses. And this is the point we make
21 about levels and changes; right? There can be different
22 levels of grower pay based on local taxes, local labor
23 costs, but there can still be common changes that ripple
24 through the market. And so -- so, yes, we agree that there
25 are localized factors, but we think our econometric analyses

1 take those into account and make sure that we're not
2 attributing any of the anticompetitive effects to those
3 localized factors.

4 I want to respond to a couple of the cases they
5 brought up when they were talking about relevant market in
6 the context of Rule 23. we do not agree that relevant
7 market is part of the Rule 23 analysis in a Section 1
8 conspiracy case, involving horizontal competitors.

9 The two cases that were referenced were *Black*.
10 That is a Section 2 monopolization case. Section 2
11 monopolization cases, of course, have market power.
12 Relevant market is required elements. They're not per se
13 offenses. The same is true of *Cox* in the -- I think it was
14 the Eastern District of Oklahoma. That was a tying case.
15 Tying claims are rule of reason claims. So we don't agree
16 that this is relevant if this case is tried under the per se
17 standard.

18 More to the point, Your Honor. If you look at the
19 motion to dismiss opinion in this case, which is -- I
20 believe Your Honor so ordered the transcript, so I'm
21 referencing the transcript from that hearing. At page 25,
22 "The Tenth Circuit has stated that horizontal price-fixing
23 and group boycott are per se violations, and so a
24 plaintiff's failure to allege a relevant market is not fatal
25 to such a claim."

1 And Your Honor in that ruling cited the Tenth
2 circuit's 2008 decision in *Campfield v. State Farm*. We
3 think that's the prevailing standard here. I mean, there
4 have been some references to this isn't price-fixing. I
5 think we'll talk about that a little more tomorrow, but, of
6 course, we lay out in our class certification papers what
7 the governing standards are, and we believe this is
8 absolutely price-fixing. It doesn't matter that they didn't
9 agree on a specific price level.

10 THE COURT: So let me make sure I understand.
11 Your position is you're required, under Rule 23(b)(3), to
12 show predominance, and with respect to the elements of your
13 Section 1 claim, including impact and damages?

14 MR. SMITH: Correct.

15 THE COURT: You seek to certify a nationwide
16 class, so you agree that part of your required proof is to
17 show nationwide impact?

18 MR. SMITH: Uh-huh.

19 THE COURT: Your point is that's a different proof
20 than that -- this market is a nationwide market. Is that
21 what you're saying?

22 MR. SMITH: Right. So I think maybe taking a step
23 back and thinking about why do we care about market
24 definition; right? The reason we care about market
25 definition is that in restraints that are per se

1 unlawful, we want to make sure that the defendants have
2 market power because we are trying to assess whether the
3 restraint in this particular instance had any competitive
4 effect. So we haven't decided, as a legal system or a
5 society, that this is something that gets condemned without
6 further inquiry, and so we're going to look at those market
7 realities.

8 So you define a relevant market simply to show do
9 they have a dominant share of that market, did they have
10 market power. And we just don't care about that inquiry in
11 a per se offense. I mean, I'm going to get into the fact
12 that we actually will be able to show monopsony power in
13 this case in any relevant or geographic market, no matter
14 how defined, but the point of the exercise is not germane to
15 a per se claim. And so that is our position, Your Honor.

16 THE COURT: And how do you think we'll try -- if
17 we get to trial -- a theory that has -- let's say your
18 no-poach agreement is evaluated as a per se -- is per se
19 illegal, and the information sharing agreement would be
20 evaluated under the rule of reason. What does that look
21 like at trial?

22 MR. SMITH: So you're saying assume there's no
23 overarching conspiracy claim that goes forward tethering
24 them together? Because there is law that --

25 THE COURT: Let's -- let's not assume that. Let's

1 assume that that's your theory and there's sufficient
2 evidence to get that question to the jury. So with an
3 overarching agreement then and the two constituent
4 agreements, how does that work?

5 MR. SMITH: In terms of the proof that we'll
6 provide or in terms of what we say about relevant market?

7 THE COURT: Well, what will we instruct the jury
8 to look for? What would be the standard that they'll apply?

9 MR. SMITH: Right. So if the overarching
10 agreement is intact, right, then I would argue that there's
11 -- it's a *per se* claim, there's no rule of reason claim
12 necessary to be put to the jury. I understand we're going
13 to brief that later and maybe we end up in a different
14 place, but we're not here now. We haven't briefed that at
15 all. I mean, they don't even try in their briefing to argue
16 for rule of reason treatment other than a passing reference
17 in our offensive *Daubert* motion, in their opposition to that
18 motion. They don't argue it in the class brief. They don't
19 argue it in the motion directed at Dr. Singer.

20 So if -- assuming that we still have the
21 overarching claim, the verdict form should say was there a
22 violation, was there impact, and if so, what are the
23 damages. And there would probably be sub-verdict forms
24 saying which of the alleged co-conspirators participated in
25 the conspiracy.

1 But in this instance, we're not putting relevant
2 market, we're not putting procompetitive justifications.
3 Those things are not on the jury form.

4 THE COURT: Well, I'm sure we will have a lot of
5 argument about the jury form.

6 MR. SMITH: Yeah.

7 THE COURT: But I understand your theory, and I
8 think I -- by your answer, I think I understand what you
9 think the law is on this point. It's helpful. Thank you.

10 MR. SMITH: Okay. So, again, some first
11 principles on relevant market analysis. This is a highly
12 fact-intensive issue. It is almost always a jury question.
13 The Tenth Circuit, in *Black*, just ruled that ordinarily
14 challenges to relevant market analysis, dueling relevant
15 market definitions are "class-wide rebuttal evidence." The
16 resolution of which are "a matter for the jury."

17 So, you know, this is sort of to get to one of the
18 points Your Honor made earlier, that we just don't really
19 think this discussion is particularly germane to class
20 certification. We think -- you know, this is not really a
21 summary judgment issue, but it is a factual question for the
22 jury.

23 Of course, I'm going to go through the analysis
24 because there is the *Daubert* motion before us.

25 So I'm going to start with relevant services

1 market; right? This is the part of the relevant market
2 analysis that decides is grower services the appropriate
3 boundaries of the relevant market. Mr. Torres didn't
4 discuss this in his opening, but it's in their motion, and
5 so I'm going to respond to it nonetheless.

6 The sole argument that they raise for exclusion of
7 Dr. Singer's opinion that the relevant services market is
8 limited to broiler grow-out services is their attack on the
9 critical elasticity regression that Dr. Singer performs.
10 Now, that regression is an input into the hypothetical
11 monopsonist test. The hypothetical monopsonist test is
12 evaluating whether a small but significant, non-transitory
13 decrease in price -- I hope that was slow enough. Okay.
14 whether that decrease in price would be profitable for a
15 hypothetical monopsonist.

16 What you do is you estimate a critical elasticity,
17 you measure the actual elasticity. If the actual elasticity
18 is less than the critical elasticity, then you pass the
19 test, and you know you've properly defined the relevant
20 services market.

21 So PPC doesn't contest any of those based
22 principles; right? They don't say that you can't do an HMT
23 test. They don't say that the small but significant,
24 non-transitory decrease in price is inappropriate. They
25 just don't like the way that Dr. Singer has specified that

1 model.

2 It's sort of worth noting, though -- and this ties
3 into the discussion we just had about what's the whole point
4 of this analysis; right? It's to show market power. And so
5 there's three reasons why. Even if you excluded this
6 regression, we still can have Dr. Singer opine on market
7 power in this case.

8 The first reason is that we show market power
9 directly; right? we show market power through
10 anticompetitive effects and the NPA and the ISA regression
11 model. And so we don't need to resort to indirect proof of
12 market power. Indirect proof of market power is the only
13 way -- or the only reason you would even define a relevant
14 market in the first instance.

15 The second reason is that Dr. Singer, in addition
16 to his econometric analyses, cites record evidence that
17 growers possess unique skills, that they have
18 industry-specific assets that are hard to transfer, and that
19 there are exit barriers in the market. That record evidence
20 on its own can be evidence of a relevant services market's
21 boundaries. You don't need to have quantitative evidence of
22 a relevant market, although we do. And there's no case they
23 cite saying you have to have quantitative evidence to prove
24 up a relevant market, and you can't do so just with record
25 evidence.

1 The third and probably the most salient for
2 purposes of this discussion is in addition to the estimated
3 critical elasticity, Dr. Singer includes a number of
4 literature studies on the estimated elasticity for the sale
5 of broilers, and he corroborates his analysis by looking at
6 those elasticities in the literature. They don't challenge
7 any of those studies as unreliable. And in each one of
8 those -- whether you take the critical elasticity that
9 Dr. Singer measured using the data in this case or whether
10 you take the measurements from the literature -- which are
11 very aligned with one another -- in every instance, you're
12 going to pass the hypothetical monopsonist test.

13 The one thing they say about that -- not in their
14 brief, but in their expert report, I believe -- is, well,
15 you can't use critical elasticities from the literature
16 because those are looking at the sale of chicken, not
17 raising chicken. And our rebuttal to that -- this is in
18 Dr. Singer's rebuttal report -- those are entirely tethered
19 to one another. You can't sell a piece of chicken that you
20 don't grow. And so we think that the critical elasticities
21 in the literature are a fair proxy for one another.

22 So all of that is to say -- before responding to
23 the specific reasons why we think Dr. Singer's measurement
24 of critical elasticity, using the data in this case, is
25 reliable and admissible -- if the Court reached a different

1 conclusion, it really doesn't alter the opinions at trial in
2 this case. It would just mean that we have three roads to
3 roam, not four.

4 Sorry. I just saw you writing something, so I was
5 going to wait.

6 Okay. So at the end of the day, what Pilgrim's
7 complain about the critical elasticity measure -- regression
8 is that it doesn't include control variables. What that is
9 trying to measure is the relationship between two variables
10 of interest, price and supply or quantity. When you add
11 control -- and that's -- by the way, that's what's called a
12 simple regression; right? A simple regression is just
13 measuring two variables of interest; right? We don't care
14 about -- this isn't a causation regression; right? We're
15 not trying to rule out independent causes. We're just
16 trying to say when price goes up, what happens to quantity.

17 What Pilgrim's is saying by saying you need to add
18 control variables into the regression, they're saying that
19 you can't use simple regression models in antitrust for any
20 purpose whatsoever. Because the second you include control
21 variables, now you're talking about multiple regression
22 analysis.

23 Now, we cite Wooldridge, the econometric treatise,
24 for the proposition that for measuring relationship between
25 just two models, you want a parsimonious model that doesn't

1 include extraneous variables because it's not a causation
2 analysis. We're not trying to rule out independent causes.
3 We're just trying to measure the relationship between two
4 simple variables.

5 Sam, can you bring up the reference manual at 269.
6 There should be highlighted text.

7 MS. DERKSEN: 268?

8 MR. SMITH: 269. Go down to 269.

9 All right. I'm just going to read it because
10 apparently our exhibit here doesn't have the -- oh, there we
11 go.

12 Okay. Sorry. "A regression model attempts to
13 combine the values of certain variables, the independent
14 variables, to get expected values for another variable, the
15 dependent variable. The model can be expressed in the form
16 of a regression equation. A simple regression equation only
17 has one independent variable. A multiple regression
18 equation has several independent variables."

19 And if you can bring up Wooldridge at 34, please.

20 All right. And this is contrasting the use of the
21 two types of regression models. "In some cases regression
22 analysis is not used to determine causality, but to simply
23 look at whether two variables are positively or negatively
24 related, much like a standard correlation analysis."

25 And what we're trying to do with the critical

1 elasticity measurement is we're really just trying to look
2 at the relationship between these two variables using a
3 simple regression.

4 There's just no authority that Pilgrim's cites
5 saying that you can't use a simple regression model in any
6 noncausation context or in any context whatsoever.

7 Their cases are all in the causation context. And
8 for what it's worth, we agree with them that if you had a
9 causation regression, if you were trying to show causation
10 and you didn't have any control variables, that's a problem,
11 and that's what the cases say.

12 But if you look at *Blue Diamond* from the Eighth
13 Circuit, they cite that case. It is a -- it's not an
14 antitrust case at all. It is, instead, measuring causation
15 in that case.

16 If you look at the *Mushroom* decision, this is an
17 antitrust case, but, again, here, we're looking at
18 causation. If you look at page 5 of that opinion, it says:
19 "The EMC defendants also contend that the control variables
20 Dr. Leffler uses in his regression models have no logical
21 relationship with mushroom prices, and, that, therefore, the
22 models cannot reliably demonstrate defendants' conduct was a
23 but-for cause of price increases." Right? We're not using
24 this model to determine but-for prices. We're not using
25 this model to determine causation.

1 That's the same thing with the two in-circuit
2 cases they cite. They cite a district court opinion from
3 Colorado. It was a discrimination case. Again, the
4 regression that lacked control variables was trying to prove
5 causation for the discrimination.

6 The *NCUA* case in the District of Kansas from 2016,
7 that was a loss causation regression in a securities case.

8 So we just don't think it's -- the one -- the one
9 argument they have to exclude the one component of the
10 relevant services market opinion, we don't think is a proper
11 application of econometrics in this case.

12 I suppose the related point -- I think we talked a
13 little bit earlier about omitted variable bias. Maybe we
14 did not.

15 At the end of the day, the argument that you
16 should have included an additional control variable, you
17 have to tell us what that variable is, and you have to show
18 us that it alters the result. They haven't been able to do
19 so. They haven't identified any legitimate omitted variable
20 in this case that alters the results of the analysis.

21 You know, the only thing that they do do is they
22 introduce this time-trend variable, right? And they say,
23 well, you put the time-trend variable in other regressions,
24 why didn't you put it in this one too. And the reason is
25 because of a problem with multicollinearity.

1 So multicollinearity -- all right.

2 Multicollinearity is a problem where you have a high
3 correlation between two variables in the model; right? And
4 in this instance, it's between the time-trend variable and
5 it's between the per capita log of income variable. And
6 when you have this high relationship between two variables,
7 this multicollinearity problem, it biases the results of the
8 regression, and you got nonsensical results, which is why
9 when Dr. McCrary does this to Dr. Singer's critical
10 elasticity measure, you end up getting results that aren't
11 statistically significant. They have no meaningful economic
12 interpretation.

13 And I'm going to quote from the *Cook* case, which
14 we cite in our brief. This is a District of Colorado case
15 that explains the problem of multicollinearity. And, again,
16 this is at page 1116. "The existence of multicollinearity
17 can cause regression parameters to be estimated imprecisely
18 and thus interfere with the predictive power of the
19 regression analysis."

20 So what Dr. McCrary is doing here is he's not
21 showing that we've omitted some legitimate variable. He's
22 introducing a variable that breaks the regression because
23 it's multicollinear with another variable of interest in the
24 regression.

25 There is one other thing they say. I'll just

1 address this quickly. They say, oh, if you put an organic
2 chicken variable into the regression, that breaks it too.
3 And Dr. Singer explains in his rebuttal that's not true. So
4 what -- they have two specifications of the model. One of
5 them has the multicollinearity problem, one of them
6 introduces organic chicken, but also the multicollinearity
7 problem. And so in both instances, the nonsensical results
8 we're seeing are driven by the multicollinear variables.

9 All right. Unless there's any questions on that,
10 I can pivot to the geographic market arguments that were so
11 pressing earlier in the day.

12 THE COURT: Just one moment.

13 Maybe I misunderstood something you said just a moment
14 ago, but --

15 MR. SMITH: Sure.

16 THE COURT: At least in Dr. Singer's information
17 sharing agreement regression, Pilgrim's does point to a
18 control that they think is missing. It's the
19 pay-per-square-foot control.

20 MR. SMITH: Yeah, but these are different
21 analyses; right? So they're saying that's an omitted
22 variable for the causation regression, which is what the ISA
23 regression is doing there; right? This is a -- they don't
24 make that same criticism of this regression. I mean, they
25 make the criticisms that I just discussed --

1 THE COURT: I understand.

2 MR. SMITH: -- but they're not making that same
3 one.

4 THE COURT: I understand. Go ahead.

10 Now, we, of course, opine that the relevant market
11 is nationwide, and that they should have 98 percent
12 nationwide. We offer the alternative analysis that you
13 could do it geographically and say that it's the Agri Stats
14 regions, in which case you still have between 78 and 98
15 percent monopsony power. But more to the point, even if you
16 define the market the way they want to define the market.
17 Even if you said it's 50, 60 miles around the complexes,
18 they haven't identified any one of those areas where you
19 don't have monopsony power in the geographic market; right?

20 And so at least in terms of the merits of the case
21 -- and I know here we're talking about Rule 702. But in
22 terms of the merits of the case, whoever is right here, you
23 get to the same result, which is that there's monopsony
24 power in the relevant geographic market.

25 But with that, I'll get into the main argument.

1 So the main argument has changed quite a bit from the
2 opening brief to the reply brief. In the reply brief, PPC
3 is now saying that the horizontal merger guidelines require
4 you to define the narrowest geographic market possible.
5 That basically you have to run the hypothetical monopsonist
6 test and if it passes at a nationwide level, then you have
7 to run it at a smaller level and a smaller level and a
8 smaller level.

9 There's no case that says that. And the
10 horizontal merger guidelines don't say that, and their
11 experts don't say that. The horizontal merger guidelines
12 that they cite, that discussion is about the relevant
13 product market. It's that you define the narrowest product
14 market that you can.

15 And I'm going to quote from that. So that same
16 passage that they cite, even as to the relevant product
17 market, doesn't draw that bright-line rule that they would
18 have you take away from it. That section says: "The
19 agencies may evaluate a merger in any relevant market
20 satisfying the hypothetical monopsonist test." Okay. So it
21 is not saying that you must define the smallest market and
22 you can only look at that one. It is saying that there are
23 myriad markets that you can evaluate for purposes of
24 assessing anticompetitive effects, which is what we really
25 care about in an antitrust case.

1 They go on that the -- the rule that Pilgrim's
2 cites "does not lead to a single relevant market" for
3 evaluating anticompetitive effects. So there is no
4 bright-line rule that you have to cut it up into smaller and
5 smaller pieces until you fail the hypothetical monopsonist
6 test.

7 And if you think about it, it's sort of a
8 nonsensical rule, which is why it's not in their expert
9 reports, which is why it's not in any case law. If you had
10 an -- if you had to always define smaller and smaller
11 relevant markets, that would mean you could never have a
12 nationwide market. Because if you had a nationwide
13 conspiracy with a hundred percent market share, they'd also
14 have a hundred percent market power in all of the submarkets
15 that were defined.

16 But according to Pilgrim's, you would have to use
17 the small market, even though they have a hundred percent
18 share in the nationwide market. That's just not a rule.
19 It's not a rule in econometrics, it's not a rule in
20 antitrust, and, you know, I would encourage you to read the
21 horizontal merger guidelines, if you're interested in this
22 issue, because I think it's illuminating on the point.

23 There was a discussion -- I'm going to switch a
24 little bit to some of the cases they cite. They cite
25 *DesLandes*, which is about low-skilled fast-food workers.

1 And I appreciate Mr. Torres' correction that, in fact, the
2 growers are high-skilled workers. we thought some of the
3 representations in the brief about them being low-skilled
4 workers weren't very fair to our clients.

5 But this case is just not like *DesLandes*. I mean,
6 these people move across state lines to get into the
7 business. They move across state lines to switch
8 integrators when they're allowed to. Obviously, the
9 no-poach is an impediment to that. And after this argument,
10 I'm going to walk through some of the deposition testimony
11 on that point.

12 These workers are more like the McDonald's
13 franchises than they are like the McDonald's workers; right?
14 And so, you know, they say the evidence -- and that really
15 contrasts this case from cases like *McDonald's*; right? The
16 *McDonald's* case, there's no evidence whatsoever that any
17 McDonald's worker ever moved to get into a better McDonald's
18 location.

19 And that's not what we have here.

20 So, Sam, I want to go through some of this
21 deposition testimony now. So why don't we start, Sam, with
22 Kevin Croft.

23 Your Honor, Kevin Croft was a Sanderson grower.
24 He was noticed up as an absent class member deposition, so
25 he's not one of the named plaintiffs. And Mr. Croft is

1 asked about a grower that he knows that switched.

2 "QUESTION: Originally, back in 2014 before they
3 switched, where was it located?

4 "They sold their contracts and farms that were in
5 either a Pilgrim's or a Tyson division in
6 Nacogdoches. Came to Palestine, purchased
7 property, and built a Sanderson Farms farm."

8 So right there, we have evidence of growers
9 selling their farm, picking up their roots, moving their
10 families to get into a better position with a different
11 integrator.

12 Can we pull up Randy Pettus?

13 Randy Pettus is an executive for Sanderson Farms.

14 And please do feel free to yell at me if I'm going
15 too fast.

16 THE COURT: She'll be yelling the whole time.

17 MR. SMITH: Sorry. I apologize, Your Honor.

18 All right. So Mr. Pettus testifies: "I can
19 remember farms; I just can't remember their names right now
20 that, you know, they were growing for Tyson some place, they
21 sold their farm, they came to grow for us or growing for
22 Pilgrim's or growing for somebody else, and they sold their
23 farm and came to grow for us."

24 Let's look at Joe Sanderson's deposition.

25 I have about nine of these, and I apologize for

1 going through nine, but this seems like it's a point of
2 contention, so I think it's important to highlight the
3 evidence.

4 Joe Sanderson says: "But, you know, there are
5 some people that come in and buy land so they can grow
6 chickens. we have a high percentage of people that will
7 come in and buy land so they can grow the chickens. It's a
8 high percentage that are not residents at the time we build
9 that complex that will come in and buy land so they can grow
10 chicken for us."

11 THE COURT: Is it the case that if you go through
12 all nine of these, you'll provide anecdotal evidence that
13 there are people who have moved in to new markets or have
14 sold out of old markets and moved into new markets?

15 MR. SMITH: Well, I would like to push back a
16 little bit on the anecdotal point, given that we're talking
17 about the CEO of an integrator saying it's a high percentage
18 of individuals that do it. I guess I would say it's
19 corroborated by the empirical analysis that we've done.

20 They reference in their brief .001 percent of
21 growers. It's closer to 2 percent, right, that relocate
22 their farms, that pick up roots, and that will move to get
23 into integrator's complex. It's 336 of the roughly 700
24 growers that are able to switch notwithstanding the
25 no-poach.

1 So, you know, look, I know 2 percent isn't 10
2 percent, but, of course, we're looking at a world that has a
3 no-poach restraint in it and is going to have some limiting
4 factor on grower mobility. I mean, at the end of the day, I
5 think the point is what you care about is whether growers at
6 the margins are going to move around. You don't need to
7 show that, you know, 50 percent of growers are going to
8 move.

9 And then the instance of new growers, and we think
10 new growers move all the time. And when you're setting pay
11 for the new growers, you're setting pay for the old growers.
12 They don't give them different contracts. So if you're
13 trying to attract sufficient new growers to fill your
14 complex, that's going to affect the pay of the existing
15 growers that aren't relocating.

16 But I think Your Honor was going to say, am I
17 going to keep reading the same quotes, and all of the quotes
18 were pretty much the same. It's growers moving from
19 California to Texas to get into the business. It's
20 integrator witnesses talking about how it's not uncommon for
21 growers either to move across state lines or to relocate
22 generally, either to sell their farm and buy a new farm or
23 to get into the business of raising broilers.

24 And we can hand those up for you. They're all
25 cited in the expert reports, but if you'd like copies, Your

1 Honor, we've got a stack for you.

2 THE COURT: And the numerical data, the quantitative
3 data is what you just recited. It's 336 out of 700 growers
4 that were eligible to switch or could switch, I think --

5 MR. SMITH: That were able to; right?

6 THE COURT: Were able.

7 MR. SMITH: So there's 24 -- there's 24,000
8 growers in the United States at any given time. Or I -- let
9 me restate that. There's 24,000 throughout the entire class
10 period. It's closer to 20,000 at any given time.

11 What we've shown empirically, by matching up name
12 and address data in the structured databases that were
13 produced, is that they're about 700 switches throughout the
14 class period, people who were able to switch notwithstanding
15 the no-poach. And of those 700, 336 moved, physically
16 relocated, their farms to do so.

17 You know, I guess -- well, never mind, Your Honor.
18 Nothing further on that particular point.

19 THE COURT: And the 2 percent figure means -- is
20 what? That's 700 switches out of -- what is 2 --

21 MR. SMITH: It was 336 over the 24,000. It's
22 rough justice. I think it's like 1.6 or 1.7. I believe I
23 said closer to 2, so ...

24 But even, again, Your Honor, if I stood up here
25 and I showed growers switch 20 percent of the time, they

1 would stand up and say, well, that doesn't sound like a very
2 effective conspiracy. So, I mean, to some extent, our
3 ability to prove this up is limited by the fact that there
4 is a restraint in the marketplace.

5 And, Your Honor, I don't have anything else on the
6 geographic market point unless Your Honor has any other
7 questions.

8 THE COURT: Mr. Torres told me that we need to
9 decide this issue now as part of class certification.
10 You've just spent a good bit of time discussing it, but I
11 think the plaintiffs' position is that it has no relevance
12 to class certification of this class for the claim that
13 you've asserted.

14 MR. SMITH: That's correct, Your Honor. I mean,
15 look, there's a world in which -- and we don't think this is
16 the way it will play out, but there's a world in which we
17 brief this, and, on summary judgment, we get a ruling we
18 don't expect or that we think is inconsistent with the case
19 law.

20 If that happens, the proper procedure is that they
21 can bring a motion for decertification, if that's justified.
22 You know, we think it wouldn't be for a lot of the reasons I
23 just said. There is monopsony power in whatever market
24 geographic that you define, and that's the reason we care
25 about the inquiry.

1 And so we don't -- we don't actually think that
2 decertification motion would be successful even at that
3 juncture, but that's the procedure to go through. We don't
4 -- we don't engage in free-ranging merits inquiries at the
5 class certification stage. And I guess I should add, you
6 know, at least for purposes of today, we're talking about
7 whether this is junk science, and I sure hope I've convinced
8 you this isn't junk science.

9 THE COURT: I mean, any class certification at
10 this stage of the proceeding is a preliminary certification,
11 that's true, and circumstances often change between the
12 class certification and trial, so I don't disagree with
13 that.

14 what else do you plan to cover, Mr. Smith? I'm
15 just wondering whether we might take a break now. I think
16 I --

17 MR. SMITH: Well, that, actually, Your Honor, is
18 basically the totality of it. I was here to address the
19 conspiracy arguments and the relevant service and geographic
20 market arguments. So I think plaintiffs are complete with
21 our rebuttal presentation.

22 THE COURT: Then, this is what I would propose.
23 I would like to take a few minutes to digest what you've
24 said, and go through my notes and think more about it and
25 figure out whether I have more questions for you before you

1 yield the podium.

2 So let's take 10 or 15 minutes and we'll come
3 back. Thank you.

4 (Recess taken.)

5 THE COURT: Mr. Smith, I think I may have just one
6 -- one or two questions left for you.

7 MR. SMITH: Sure.

8 THE COURT: It became evident early in my review
9 of the papers that you can't skip the footnotes in these
10 briefs. There's a lot of meat in the footnotes. The
11 defendants raise at different points in their papers an
12 argument -- it's a variation of an argument that
13 Dr. Singer's opinion is out of line with the plaintiffs'
14 theory in the case.

15 I think we spoke earlier about performance versus
16 pay, and you talked about the sharing of the tournament data
17 through Agri Stats and the like, but there's also, I think
18 -- I think in one of the footnotes in Pilgrim's opposition
19 to your class certification, there's a -- what I understood
20 to be an argument that Dr. Singer is misaligned with your
21 theory on -- it has to do with a difference between base pay
22 and total pay for the growers. Do you have that argument in
23 mind? Do you remember that?

24 MR. SMITH: I don't have it in mind, Your Honor,
25 but --

1 THE COURT: Then maybe let's hear from Pilgrim's,
2 and if there's something you would like to add, we could --

3 MR. SMITH: This is in the class brief, not the
4 *Daubert* brief, you're saying?

5 THE COURT: Right. In a footnote.

6 Okay. All right. Thank you.

7 Mr. Torres, I assume there's something else you
8 would like to say?

9 MR. TORRES: A couple of things, Your Honor.

10 Your Honor, let me start, if I could, with the
11 national class and the importance of making a determination
12 in the context of class certification, determining whether
13 it's a nationwide market. And in the *Funeral Consumers*
14 decision in 2012, let me read exactly the language on that
15 point. The court stated that: "Because plaintiffs brought
16 this case as a nationwide class action, the recovery they
17 seek under Section 1 of the Sherman Act and Section 4 of the
18 Clayton Act requires that they show the relevant geographic
19 market is national," in order to show the antitrust impact
20 element of their claim, even at the class certification
21 stage.

22 And, in addition, in the *Exhaust Unlimited*
23 decision v. *Cintas Corp.*, a Southern District of Illinois
24 decision, the court states and I quote: "Common proof of
25 actual injury to each class member requires that all class

1 members operate in the same relevant market, otherwise, they
2 could not be affected in a common manner by the challenged
3 conduct."

4 So those questions -- I mean, those quotes from
5 those decisions, Your Honor, explicitly explain the reason
6 that a determination has to be made concerning a national
7 market.

8 THE COURT: So I'll confess that among the cases I
9 read, neither of those were in the group I read. What
10 courts are they from?

11 MR. TORRES: I'm sorry, Your Honor.

12 THE COURT: *Funeral Consumers*?

13 MR. TORRES: This is *Funeral Consumers* and the
14 cite is 695 F.3d 330, and it's the Fifth Circuit, 2012.

15 And the *Exhaust Unlimited, Inc. v. Cintas*,
16 C-I-N-T-A-S, Corp, 223 F.R.D., at -- it's the Southern
17 District of Illinois, 2004.

18 And *Black* as well, Your Honor, in the -- on this
19 relevant market point, and this is -- I don't have the exact
20 page because I have the Lexis printout, but the language is:
21 "Because market power contextualized by the relevant market,
22 inquiry into an antitrust defendant's market power
23 necessarily begins with defining the relevant market." And
24 "A defendant's market share is a necessary, but not
25 independently sufficient, component of establishing its

1 power in the relevant market."

2 And then there's a discussion concerning the
3 relevant market.

4 THE COURT: So if you go back a page in that
5 decision, though, the Tenth Circuit makes clear that the
6 plaintiffs in that case had to prove monopoly power in the
7 relevant market and that it was willfully acquired or
8 maintained because it was a Section 2 claim. Those are not
9 elements of the Section 1 claim that the plaintiffs have
10 here.

11 MR. TORRES: But one of the elements of the
12 Section 1 claim, they still -- they're required to show
13 impact. And if you're alleging a national class, that you
14 have to show impact with respect to the national class.
15 It's their pleading. It's the way they framed the issues in
16 terms of the -- of their analysis. And this is precisely
17 what -- you know, what the *Funeral Consumers* decision
18 states.

19 THE COURT: Okay. I'll sort it out.

20 MR. TORRES: Okay.

21 THE COURT: But what Mr. Smith said makes sense to
22 me. When we're talking about the relevant market and the
23 purposes for engaging in that analysis, what's the relevance
24 in that exercise if we're in a *per se* illegal world?

25 MR. TORRES: Because the issue is to decide

1 whether there's been antitrust impact, and in order to
2 determine whether there's been antitrust impact, it's
3 necessary to understand what the market is.

4 THE COURT: Well, we have a national class that
5 the plaintiffs seek to certify. They're going to have to
6 convince me that they can -- that there's class-wide proof
7 susceptible of showing injury to that whole class. That's
8 the nation.

9 MR. TORRES: That's their allegation, Your Honor.
10 And we're saying in a class action context, the Court can
11 look beyond the mere pleadings and actually look at the
12 reality of what the market is in order to make that
13 Section 1 assessment concerning impact.

14 THE COURT: Okay. All right.

15 MR. TORRES: Number two, Your Honor, in the in --
16 plaintiffs cited to the *In re Broiler* decision as one of the
17 cases that has blessed the in-sample methodology. As far as
18 I know, this is not a case that considered and evaluated the
19 in-sample analyses or the critiques that were made by
20 Dr. Saravia in her expert report.

21 The third point, Your Honor, on the critical
22 elasticity point. In connection with this point about this
23 being a correlation exercise, not a regression exercise, but
24 the fact is that there are actually two regressions in the
25 critical elasticity test. One deals with the actual

1 elasticity, the second with the critical elasticity.

2 In each of those -- and the critique that is made
3 by Dr. McCrary, is that in each of those, there has to be
4 control variables, and they failed to provide evidence of
5 what those control variables were.

6 And the reason it's important is because you have
7 two lines, and they're making a judgment in terms of whether
8 to determine the market, whether the actual pay is above or
9 below the line. But you need to look at the actual
10 regressions concerning those two lines in order to make that
11 determination. And that's where the absence of control
12 variable, according to Dr. McCrary, is relevant.

13 THE COURT: So what's the control that's missing?

14 MR. TORRES: Pardon me?

15 THE COURT: Does he identify a control that's
16 missing that needed to be part of the analysis?

17 MR. TORRES: He gave -- he gave one example of the
18 linear trend, how that could affect it, but there may be
19 others.

20 THE COURT: But that's not a control variable that
21 he's arguing needs to be included in the analysis, is it, or
22 do I misunderstand?

23 MR. TORRES: Well, what he's saying is that --
24 they don't articulate what the control variables were for
25 the actual elasticity and the critical elasticity. So you

1 don't know whether that line that they're setting is an
2 accurate representation, because he has -- no information
3 has been presented concerning the control variables.

4 THE COURT: So the argument is that there are
5 control variables that he needed to include that he didn't,
6 or the argument is he just didn't tell us what controls he
7 had, if any.

8 MR. TORRES: Yeah. Your Honor, a regression that
9 has no controls, you know, as matter of law, is not -- has
10 no reliable value. And this relates to a separate point
11 concerning omitted variables that are considered key in the
12 case. And we're going to cite -- because this deals with
13 the -- and ties into the density, the housing density, the
14 failure to control in that context, but it's a similar issue
15 that I'll turn to shortly.

16 THE COURT: I just want to make sure I understand
17 what you just said. Did you just say that an analysis that
18 doesn't -- what did you say? A regression that doesn't have
19 controls is invalid as a matter of law. Did I misunderstand?

20 MR. TORRES: The regression -- he has two
21 regressions that he has to articulate what controls were
22 used in each of those regressions, and his critique is that
23 that's not set forth in the report. So it has no
24 understanding as to the validity of the accuracy of those --
25 of those two lines, because there's no definition or

1 description of the regressions that were run and the
2 underlying controls that were used.

3 THE COURT: And what is it that makes that
4 inadmissible as a matter of law? And what authority would I
5 go to? I read that phrase, I think, three times in
6 Pilgrim's briefing, and I'll tell you each time you lost me,
7 because there wasn't a citation that made clear that the
8 statement you were making is a legal principle as opposed to
9 application to the kind of judgment we're talking about
10 under 702.

11 MR. TORRES: It's a 702 point under the -- the
12 requirement that the methodology has to be reasonably
13 applied. And his judgment -- or opinion is that it was not
14 reasonably applied because of the failure to identify and
15 specify those controls.

16 THE COURT: Okay. And I see Mr. Smith jumping out
17 of his seat. We'll come back to you, Mr. Smith. We'll have
18 a chance to hear from everybody before we stop. It's too
19 important to skip over any of this.

20 Go ahead, though. You're on a roll, Mr. Torres.

21 MR. TORRES: Okay, Your Honor. And then in
22 connection with the academic references -- again, this is on
23 the critical elasticity point that were cited by Dr. Singer
24 as relevant. And I'll just -- I'll mention what some of
25 them are. One of them is from the -- it involves data from

1 Turkey from 1983 to 1998. And it involves -- and it's
2 comparison to the broiler production and the wholesale price
3 of chicken.

4 Another is from Indonesia, from 2000 -- from a
5 2000 survey, and this involves a comparison of the number of
6 birds versus the number of chickens.

7 And the others go back -- one goes back to 1965,
8 1979, and 1965. Those are -- that's the sum and total.
9 This appears at Exhibit 37 of Dr. Singer's report. I mean,
10 McCrary's report.

11 On the -- returning to the housing density point,
12 Your Honor. And this is the point where in connection with
13 omitted variables and the importance of ensuring that if you
14 -- obviously, experts can differ in terms of what the
15 appropriate control variables are that you include in a
16 regression, but if you omit a key variable, then that
17 renders the regression unreliable. And the cases that we
18 cite in support of that proposition, Your Honor, are
19 *National Credit Union v. UBS*, W-E-R-E-D-E,
20 *v. Allright*, and *Reed Construction v. McGraw-Hill*.

21 THE COURT: How does a -- how does a judge without
22 a PhD from Stanford, with opinions from two qualified
23 experts in economics who disagree about whether a key
24 variable is -- goes to the weight or admissibility of the
25 opinion, how do I resolve that?

1 MR. TORRES: well, in this -- in this particular
2 instance, Your Honor, you respond by looking at Dr. Singer's
3 testimony, where he essentially -- and I showed it this
4 morning -- where he indicated -- and he was asked a question
5 in terms of if you run a regression and you have some
6 variables, and then it's challenged, and it turns out that
7 they've identified a variable that was excluded, and that
8 variable has a materially significant impact on the outcome,
9 then it's not -- the model would not be considered reliable.

10 He didn't link it to this case, but the variance
11 between the reported value in his model and the -- and the
12 outcome, if he had included the omitted variable, would be
13 70 percent. So, therefore -- I read through his own
14 testimony. That's a variable that renders the model
15 unreliable.

16 And the three cases I cited, Your Honor, are cases
17 that take -- distinguish between cases where there's just
18 disagreement in terms of what the inclusion of the variables
19 are and makes the more critical point that if you establish
20 that there's a key omitted variable, then that is -- then
21 the regression results are not reliable.

22 So in this case, it's the legal argument that --
23 or the legal position as set forth in those decisions and
24 his own admission concerning what's a material -- and
25 considered a key variable.

1 THE COURT: okay.

2 MR. TORRES: Switching, Your Honor.

3 You heard the reference to -- or the response in
4 connection with the low switching rates, and I had mentioned
5 during our argument the .01 percent.

6 And the response from the plaintiffs was that,
7 well, 43 percent of those moved. But that's still -- .01
8 percent is still an infinitesimally small number, and it
9 doesn't really say anything about moved to where. Because
10 they're talking about a national market, but no analysis was
11 done here. In one case, I think the example they gave and
12 some other examples, they may move across the state line.

13 So the point is that in terms of the underlying
14 quantitative number is infinitesimally small, number one.
15 And, number two, there actually is data that was never used
16 by Dr. Singer to actually do the analysis in connection with
17 switching rates in other areas. The only thing he did was
18 looked at Delmarva, the switching rate in Delmarva, found
19 out that -- you know, and concluded that -- well, two
20 things.

21 One, he admits that switching rate is important
22 for determining outputs with respect to grower pay. That's
23 number one. But then he admits that there is a difference
24 between the switching rates in Delmarva and the switching
25 rates in the rest of the country.

1 And a subcomponent of his next argument is that he
2 finds that after the commencement of the "war on the shore,"
3 the switching rate in Delmarva increased or doubled. And
4 they -- the plaintiffs love that because they -- they argue
5 that this shows that switching rates were directly related
6 to the alleged no-poach agreement. But what he fails to do
7 is to consider what was happening outside the country -- as
8 he's done with some of these other tests -- what was
9 happening outside the country with respect to switching
10 rates.

11 Instead, what he does is he presents a chart,
12 where he takes an aggregated high-level average and just
13 takes one average, and then compares that and makes a
14 declaratory statement that it shows that the switching rates
15 remain the same. But that -- that analysis -- or there is
16 no analysis. It's just an average.

17 And if you actually look at his own charts where
18 he does it on an integrator basis, and he actually -- and
19 you actually -- and a regional basis -- and the regions, by
20 the way, are the regions that were set forth in the
21 Agri Stats data -- he actually does no analysis with respect
22 to that, but the one thing that is clear from that data is
23 that there's variance throughout the region. There's
24 variance throughout the -- among integrators. But ignored
25 all of that and conducted no analysis to determine whether

1 there was any difference -- any significant difference
2 between Delmarva and outside the country, from which you
3 could draw some kind of inference that the impact was -- you
4 know, that there was -- that the impact or the switching
5 rate did not change outside Delmarva because of the alleged
6 continuation of the no-poach agreement.

7 THE COURT: I'm sure I know the answer to this
8 question, and I'm not trying to be tricky, but you keep
9 saying "outside the country." You mean outside --

10 MR. TORRES: Outside Delmarva. Outside Delmarva.
11 Sorry, Your Honor.

12 And just on that last point, Your Honor, this
13 includes -- and this is at paragraph 234 of his report.
14 This includes areas where you see one of the differences
15 that exist in the country that could impact on switching
16 rates and it's a lot -- you know, common sense difference,
17 which is what is the concentration, the relative
18 concentration of integrator companies within different parts
19 of the country.

20 And last, in connection with some of the data that
21 he did present, concerning Agri Stats, that was broke down
22 into regions, he was asked about how -- does he have any
23 knowledge about the way those regions were developed, what
24 the standards were, what the criteria were, absolutely no
25 idea. So, really, nothing, other than a superficial

1 assessment of what happened outside of Delmarva, based on
2 these gross averages that really mask all the barriers that
3 existed there.

4 On the pay structure, Your Honor. The trend
5 that's relevant here is -- he's talking about -- first, let
6 me back up. He's talking about correlation, and he makes
7 the point that, well, correlation is different from this
8 rigid, structured paradigm that we articulated based on the
9 Pennsylvania case, and he said that's not the standard. And
10 the standard, when you're doing these types of analysis, is
11 correlation, and that really doesn't require any kind of
12 level of rigidity in connection with assessing whether you
13 have met the criteria.

14 But the criteria here and the test that's being
15 measured and the conclusion that's being assessed is
16 Dr. Singer's opinion concerning the price structure. In his
17 opinion -- and this is at -- let me see -- at paragraph 289
18 of his report, where he says that they moved in lockstep.
19 He's not referring to there was some correlation in
20 connection with pay at some level. He's saying -- and his
21 opinion is that they moved in lockstep. I'm sorry. It's
22 259, not 289.

23 And, Your Honor, I would just refer you to the
24 *Kamakahi* decision where the issue came up concerning his use
25 of pricing -- there was the pricing structure case, the

1 human egg donor case, where the court looked at the kind of
2 analysis that he did here and excluded his testimony.

3 Just one second, Your Honor.

4 Yeah. On the pay structure -- and this is the
5 point from *Kamakahi* that also applies here -- is because it
6 was really detecting a trend within a dataset, not across
7 the dataset. And that's relevant here because what he's
8 referring to -- and, really, the predicate or his basis for
9 argument that there was transmission across the country from
10 some inflated rate, at one level, is that there is -- it's
11 across -- that is correlation across the datasets.

12 Thank you, Your Honor.

13 THE COURT: Thank you.

14 Mr. Smith.

15 MR. SMITH: And I'll be -- I'll be very brief,
16 Your Honor.

17 THE COURT: Brief, but not fast.

18 MR. SMITH: I'll be brief and slow.

19 So I just want to clarify a few things and give
20 you a couple of citations to the record. If you look -- if
21 you look at the Singer report, the opening Singer report, at
22 paragraph 71, you'll see that Singer identifies that there
23 are 750 -- some 750 growers that switched, 43.5 percent of
24 which, or 336 growers, physically relocated their farms to
25 do so. You can do the math yourself, Your Honor. That's

1 not .001 percent.

2 The discussion about control variables in the
3 critical elasticity regression. There are no control
4 variables in the critical elasticity regression. This is
5 the point we walked through with the econometrics literature
6 about the difference between simple and multiple regression
7 analysis, and how simple regression analysis is used when
8 you're doing something other than determining causation,
9 when you're only evaluating the relationship between two
10 variables in the critical elasticity context, that is price
11 and supply or quantity. I just wanted to clarify what the
12 criticism was and what our response to it was.

13 And, you know, there were these references to
14 there's some omitted variable, but we don't know what it is,
15 and that's not the *Daubert* standard. You have to come
16 forward and show what an omitted variable is, have a
17 legitimate omitted variable, show that it is appropriate to
18 introduce that variable, and that it doesn't bias the
19 results.

20 For the critical elasticity regression, the only
21 thing they have is the multicollinear time-trend variable,
22 which probably was designed simply to break the regression.

23 And this is a quote from the *Mushroom Direct*
24 *Purchaser* case. I think Mr. Walker will have a few and have
25 a similar quote from the *Urethane* case. "There must be more

1 than a mere possibility that an expert's model is unreliable
2 in order to exclude it from the jury's consideration." And
3 this was a discussion in the context of "the use of
4 meaningless control variables."

5 All that Pilgrim's has gotten up and offered for
6 you is the mere possibility of an omitted variable in the
7 critical elasticity regression. That is nowhere near
8 sufficient under Rule 702.

9 Unless Your Honor has questions, that's all I
10 have.

11 THE COURT: Thank you.

12 MR. WALKER: Your Honor, may I get up and make a
13 couple of points?

14 THE COURT: Would you, please.

15 MR. WALKER: So I just want to briefly and slowly
16 take them in reverse order. The *Kamakahi* case -- I think we
17 talked about this earlier. You know, Dr. Singer testified
18 that he just did not have the evidence in that case because
19 it hadn't been elicited by the plaintiffs, but hypothesized
20 that he could find a pay structure if given the evidence.
21 And the court said, well, you just don't have the evidence,
22 you don't have the evidence. It wasn't sufficient.

23 Here, he goes through all the analyses we
24 discussed about pay structure and record evidence and
25 quantitative evidence. I'm not going to go through it

1 again, except to say it's a vastly different case than
2 *Kamakahi*.

3 I would say with the switching rates, I didn't
4 entirely follow the discussion, but I think the key factor
5 there is the jump in rates, the change in rates, during the
6 "war on the shore" is something that is not seen elsewhere.

7 There were different baseline switching rates in
8 different parts of the country, but the sort of salient fact
9 is during the "war on the shore," there was a jump not -- as
10 far as I know, not seen elsewhere. And I don't think their
11 experts pointed out any jump elsewhere either.

12 THE COURT: Well, but Mr. Torres did say, but it's
13 an artificial market because of the density of integrators
14 and growers in that region. It's not representative, for
15 example, of -- and now I'm making this up -- New Mexico.
16 And did Dr. Singer account for that?

17 MR. WALKER: Dr. Singer does account for that. I
18 mean, there's the -- there are, you know, regressions, like
19 the ISA -- the information sharing regression, which account
20 for regional differences in pay. There's the in-sample,
21 which is run on transactions.

22 But also the key fact is a baseline level -- a
23 higher baseline level of switching doesn't mean that there's
24 different competitive baseline -- different competitive
25 scenarios in each market that meaningfully will change

1 whether the results can be extrapolated. what he would say
2 is, what we see here is a jump that we think we would see a
3 similar jump elsewhere. Even if the numbers of switches may
4 be lower, the change would be similar because of -- and it's
5 the change in rates that matters for purposes of impact, not
6 just the baseline rates.

7 In fact, I think -- I'm not entirely sure they
8 made this argument, but to the extent the baseline level
9 made Delmarva more competitive, I would think that it would
10 make a conservative benchmark. But I don't really think
11 they made that argument. And, in any event, what you really
12 want to focus on is the -- is the change in rates that
13 happened at that time, that would, we think, happen
14 elsewhere if the no-poach broke down across the country.

15 On the omitted variables, the -- typically, you
16 test for an omitted variable by take the regression with all
17 the data and the benchmarks and everything, and you add in a
18 control variable, and you see whether it changes the
19 results.

20 we talked about it earlier. what they did was
21 completely broke the model, changed -- you know, took out 98
22 of the pay -- 98 percent of the transactions and then said
23 -- or 90 percent or what it is -- and then said, oh, here's
24 this variable. If you add it, it changes the results of the
25 model. That's not testing for an omitted variable.

1 And I would say that the case law doesn't really
2 support them either. In *Urethanes*, in the Tenth Circuit,
3 the court said -- well, first said, the use of variables
4 bears on the weight of the expert's opinions, not their
5 admissibility. This is the Tenth Circuit *Urethanes* case.

6 The court also said, "the exclusion of major
7 variables or the inclusion of improper variables may
8 diminish the probative value of a regression model. But
9 such defects do not generally preclude admissibility, and
10 courts allow use of a regression model as long as it
11 includes the variables accounting for the major factors."

12 And then the court says expert "had no need to
13 consider every measurable factor, just the 'major' ones."

14 As I said earlier, A, they're not really testing
15 for an omitted variable because of the way they changed the
16 regression. But, B, the regression already accounts for the
17 flock size, which no one has ever explained why the size of
18 the house matters for grower pay, independent of the number
19 of birds that the grower is growing at a time.

20 In any event, I think he clearly accounts for the
21 major variables. He has all sorts of control variables for
22 grower characteristics, macroeconomic -- you know, I just
23 don't -- regional fixed affects. I just don't see how you
24 could say that he excludes a major variable under these
25 circumstances.

1 And I would say -- I didn't catch all the cases
2 that Mr. Torres rattled off, but at least the -- I don't
3 know how to pronounce it -- *Werede* case, W-E-R-E-D-E, that
4 model -- first of all, the court said it was relying on
5 "Tenth Circuit authority on the use of statistical evidence
6 in discrimination cases." And it seems at odds with
7 *Urethane* in the antitrust context. But in any event, in
8 that case, the model had essentially no control variables.
9 It included -- it only included starting salaries and race
10 or national origin. Didn't control for any of the other
11 things that might have affected the hiring and pay in a
12 discrimination case.

13 And then my last point -- I promise -- for right
14 now, at least. Mr. Torres said that he doesn't think the
15 in-sample method was used in the *Broilers* case. In
16 footnote 3, on page 1, of our option brief, here's -- from
17 the *Broilers*, it denied the *Daubert* motion, challenging
18 regression that "calculated what the market price of whole
19 broilers should have been but for the alleged conspiracy,"
20 and deeming a class member impacted if they "paid an actual
21 price exceeding the but-for predicted price by examining the
22 but-for price for specific transactions."

23 And we actually attached the expert report from
24 the *Broilers* case. If you have a desire to read yet another
25 economic expert report, it's there for you to see what the

1 defense expert did in trying to rebut the in-sample
2 regression, and his arguments were essentially the same as
3 what Dr. Saravia is making here.

4 THE COURT: Thank you.

5 MR. WALKER: Thank you, Your Honor.

6 THE COURT: Mr. Torres, we've already heard from
7 you a lot, but it's your motion. Is there -- do you have a
8 final word?

9 MR. TORRES: Just a few points, Your Honor.

10 Your Honor, first of all, the comment that was
11 just made by plaintiffs concerning housing and it not having
12 an impact in pay, I will refer Your Honor to Dr. Carey's
13 expert report, which goes on at length in terms of
14 demonstrating the critical nature of housing, the technology
15 that's used in connection with grower pay.

16 THE COURT: What I thought I understood the
17 concern to be was that from the plaintiffs' perspective,
18 Pilgrim's hasn't explained why accounting for flock size
19 doesn't account for the housing density concerns.

20 MR. TORRES: Well, Your Honor, the issue is that
21 -- and he explains this in terms of housing density, but
22 when you look at the actual results that were generated from
23 the model, you know that because it completely changes --
24 whatever qualitative decisions are made about how housing
25 density impacts grower pay, the actual results show that

1 there's a 70 percent reduction in terms of that -- of that
2 variable.

3 THE COURT: Without any other change to
4 Dr. Singer's model?

5 MR. TORRES: Without -- well, in --

6 THE COURT: You isolated that one -- one control.

7 MR. TORRES: They isolate it -- as I understand
8 it, what the exercise was, was to include the housing
9 density variable, and the reason they included the housing
10 density variable was because of the record evidence
11 concerning those four growers that I mentioned before,
12 Freebird, Gerber, Holmes, and Murray's, where you had all of
13 these qualitative differences relating to the way that the
14 market was run.

15 And so there are a lot of -- you know, there are a
16 lot of different elements of the way those alleged -- you
17 know, the integrators operated their business and the manner
18 in which the outcomes, with respect to pay, were really
19 impacted by those issues, which included the fact that they
20 have fewer birds, and they require more space and they
21 require more time. So it's not just a matter of space.
22 They also require more time, more out time. In terms of --
23 the focus was, you know, kind of laser-focused in terms of
24 the health of the birds.

25 And there were a lot incremental costs that were

1 associated with this, which also relates to the housing
2 issue. So it's not a simple matter of just saying that he
3 looked at, you know, the square foot or certain other
4 aspects that don't directly go to density.

5 THE COURT: Dr. McCrary ran that test against a
6 different dataset than Dr. Singer's dataset. Yes?

7 MR. TORRES: Well, now, as I understand it, it was
8 -- it was -- well, the dataset that he ran was the dataset
9 that was used by Dr. Singer, and the adjustment or the
10 correction, I believe, that he made was that he included the
11 housing density.

12 Yeah. I'm sorry. This is what I would clarify,
13 it was Dr. Singer who made the adjustment. In other words,
14 when he got the report from Dr. McCrary, he made the
15 adjustment. Sorry. I misspoke.

16 THE COURT: Understood; okay?

17 MR. TORRES: Yeah.

18 And then the last point, Your Honor, is just going
19 back to -- to close the loop on this issue concerning the
20 omitted variable. And this is from the *National Credit*
21 *Union* decision. It also kind of ties into one of the issues
22 that Your Honor was inquiring about earlier, which is, you
23 know, the falsification test. And this is from *National*
24 *Credit Union*, where the court -- where the court essentially
25 states that the purpose of the falsification test is to

1 assess whether a regression is so incomplete and flawed that
2 it cannot reliably measure impact. You know, not to
3 identify an omitted variable. And this is the language that
4 the court uses. To have required -- the party in that case
5 -- but "to have required the defendant to have constructed
6 and conducted the proper analysis to correct the plaintiff's
7 error would be to improperly shift the burden of proof."

8 And that's what they're seeking to do here, to
9 shift the burden of proof with respect to this housing
10 density issue, that we have to identify an omitted variable.
11 But even if that were the standard, we have identified the
12 omitted variable, which is housing density.

13 THE COURT: Okay.

14 MR. TORRES: Thank you.

15 THE COURT: All right. Thanks for your patience
16 today, everyone, and the discussion. It's helpful. It
17 definitely adds some context and contour to the papers.

18 We'll resume tomorrow at 9:00 a.m. with class
19 certification.

20 I think a lot of the work we've done today relates
21 to the -- at least the predominance elements, and the 23(a)
22 elements are just not nearly as complex, I don't think, and
23 fact specific -- well, they are fact specific. I think the
24 argument will move more quickly. In fact, I'm sure of it
25 because we'll recess by about one tomorrow. So we're going

1 to march through this and without a lunch probably. Bring
2 snacks if you need some so you don't pass out at the table.
3 We won't stop to resuscitate anyone.

4 I hope you have a restful night. Thanks for your
5 excellent argument. We'll be in recess.

6 (PROCEEDINGS CONCLUDED.)

7

8 REPORTER'S CERTIFICATE

9 I, Joanna Smith, Registered Professional Reporter
10 and Certified Shorthand Reporter, in and for the State of
11 Oklahoma, do hereby certify that the foregoing is a correct
12 transcript from the official proceedings in the
13 above-entitled matter.

14

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